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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

Of Counsel:

Hand, Arendall, Bedsole,
Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601

C. B. ARENDALL, JR.
WILLIAM C. TIDWELL, III
TRAVIS M. BEDSOLE, JR.
Post Office Box 123
Mobile, Alabama 36601

Legal Department of the
City of Mobile
Mobile, Alabama 36602

FRED G. COLLINS,
City Attorney, City Hall
Mobile, Alabama 36602

Rhyne & Rhyne
1000 Connecticut Avenue, N.W
Suite 800
Washington, D.C. 20036

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR
MARTIN W. MATZEN
1000 Connecticut Avenue, N.W
Suite 800
Washington, D. C. 20036

Counsel for Appellants

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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ON APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 29, 1978, affirming the judgment and orders of the United States District Court for the Southern District of Alabama, decided October 21, 1976. These hold the existing Commission form of government and at-large electoral system of the City of Mobile unconstitutional under the Fourteenth and Fifteenth Amendments to the U.S. Constitution as denying black citizens access to the City's political processes. The anti-corruption purposes of the Commission form of government and the equal access and

control provided to all voters by this form have never been reviewed as to constitutional compliance by this Court.

Also affirmed were orders of the District Court that the 67 year old City Government be disestablished and replaced by a strong mayor-council government elected by a single-member districts pursuant to a new City Charter imposed by the District Court. Since the Commission form of government vests in the Commissioners both legislative and specialized, individual administrative powers, the District Court's remedial order established an entire new administrative structure fixing salaries, powers and duties to operate under the mayor-council form.

By order of May 31, 1978, the District Court has set November 21, 1978, as the time for election of Mobile's new mayor-council government. However, the order provides that these elections shall be stayed if this Court grants review before that date.

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and the substantial new and novel questions are presented under the Constitution of the United States.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported in 571 F.2d 238, and that of the District Court is reported in 423 F.Supp. 384. Both Opinions are attached hereto as Appendices A and B, respectively. The Judgment of the District Court, entered on October 22, 1976, and the Order of the District Court, entered March 9, 1977, setting forth the new City Charter imposed by that Court, are both unreported. Copies are attached hereto as Appendices C

and D, respectively. The Order of the District Court, entered May 31, 1978, setting November 21, 1978 as the time for election of Mobile's new mayor-council government unless this Court sooner grants review, is set forth as Appendix E hereto.

JURISDICTION

This suit was brought as a class action in behalf of all black citizens of Mobile under 28 U.S.C. §1343(3)-(4), alleging that the present at-large system of electing City Commissioners abridges the rights of black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution; under the Civil Rights Act of 1871, 42 U.S.C. §1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973 *et seq.*[1] The judgment of the District Court was entered on October 21, 1976; and appeal was taken to the Court of Appeals, which rendered judgment affirming the District Court on March 29, 1978. Notice of appeal was filed in the Court of Appeals June 19, 1978 (Appendix H).

The City's existing Commission Government was adopted in 1911 pursuant to State statute, Ala. Act No. 281 (1911).[2] Because the subject of this appeal is a judgment holding this local application of a State statute unconstitutional, the jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. §1254(2). *Dusch v. Davis*, 387 U.S. 112, 114; *Clark v. Peters*, 422 U.S. 1031. *Cf. New Orleans v. Dukes*, 472 U.S. 297, 301.

[1]Neither Court below relied upon the Voting Rights Act of 1965 for jurisdiction.

[2]This statute, as amended, is presently codified at Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977).

QUESTIONS PRESENTED

1. Whether the Commission form of Government designed to fix in the head of each administrative department responsibility directly to the voters and thereby eliminate corruption and ward-heeling through direct election of each Commissioner by each voter of the City, violates the Federal Constitution because the Commission form of government cannot guarantee that one or more of the Commissioners will come from black residents who comprise one-third of the City's population?

2. Whether the holdings of the Courts below conflict with the constitutional principles established by this Court in *Whitcomb v. Chavis*, 403 U.S. 124, *White v. Regester*, 412 U.S. 755, *Washington v. Davis*, 426 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252?

3. Whether discriminatory effect has been proved when no qualified black candidate has run for the office of Commissioner under the challenged at-large city commission electoral system?

4. Whether the Courts below, in disregarding active and effective black voter and leader participation in Mobile's elections as irrelevant, have erroneously given the effects of racially polarized voting independent and controlling significance as a constitutional violation?

5. Whether the Constitution authorizes a Federal Court to legislate an entirely new form of government for the City for no purpose except that of guaranteeing that black citizens who constitute a minority of the City's voters will be elected to City offices?

STATUTES INVOLVED

This case involves the constitutionality under the Fourteenth and Fifteenth Amendments to the U.S. Constitution of Alabama Act No. 281 (1911), as locally implemented by a vote of the electorate, providing the Commission Government for the City of Mobile in 1911. This statute, as amended, is now codified at Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977), set forth in pertinent part in Appendix F hereto.

Also involved is Alabama Act No. 823 (1965), set forth in Appendix G hereto.

STATEMENT

The following central facts were found by the District Court or undisputed below (see *infra*, pp. 10-12): (1) no formal or legal barriers exist to black citizens' registering to vote, voting, or running for the office of City Commissioner; (2) support of black citizens was actively sought by all candidates in recent City elections, with two of three present Commissioners having been elected with the endorsement of the City's most influential black political organization; (3) one of the three present Commissioners was elected on the strength of the black "swing vote;" and (4) only 3 blacks have ever run for the City Commission, the District Court finding that they were "young, inexperienced and mounted extremely limited campaigns" (423 F.Supp. at 388; App. B, p. 8b), and they failed even to carry predominantly black census wards.

At the outset it should be noted that at-large dilution

cases such as this one are not municipal services cases;[3] nor are they cases guaranteeing the election of blacks.[4] Finally, they are not cases justiciable under the Voting Rights Act as involving recent changes. The Courts of Appeals, particularly the Fifth Circuit, have for the last five years struggled in vain to develop a test for evaluating the quality of required constitutional black political participation short of a constitutional guarantee of election of black candidates.[5] The starting points have been this Court's decisions in *Whitcomb v. Chavis*, 403 U.S. 124 and *White v. Regester*, 412 U.S. 755. The latest effort is a quartet of cases, of which *Nevett v. Sides (Nevett II)*, 571 F.2d 209 (5th Cir. 1978) is the principal exposition, and which includes the instant case. *Nevett II* focused on the activities, principally activities in the electoral process, of white elected incumbents. This quartet of decisions does in fact guarantee that a black minority has a constitutional right to elect a black person to city office.

Heretofore at-large dilution decisions of this Court did not guarantee black voters who are a minority of the voters the constitutional right that a black win public office. These cases only guarantee black voters the right to have their

[3]The paradigm municipal services case is *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972).

[4]Such a desideratum is not a constitutional imperative. *Whitcomb v. Chavis*, 403 U.S. 124, 153.

[5]Both Courts below based their analysis upon the multifactor test presently controlling "dilution" cases such as this in the Fifth Circuit, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *affirmed sub. nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (but "without approval of the constitutional views" expressed in *Zimmer*, 424 U.S. at 638).

vote count in a meaningful fashion. If white officials ignore black voters, on the campaign stump and at City Hall, and if white officials resist a change from an at-large to a district electoral system in order to rely upon the white majority vote to insulate such insensitivity from electoral accountability, a constitutional violation is made out. *Nevett II*, 571 F.2d at 223.

Plaintiffs, to prevail in a Fourteenth[6] or Fifteenth[7] Amendment voting dilution case, must prove each element of electoral arrogance by white candidates and incumbents: white polarized voting which negates any electoral significance of black polarized voting; white campaigning with this effect in mind; and white officials' intentional action to create, or resist change to, an at-large system in order to perpetuate this effect.

The activities of white incumbents must evince a purposeful discrimination. *Nevett II*, 571 F.2d at 219, 221. The adoption of a "tort" standard—that the officials intend the natural consequences of their acts—facilitates proof of discriminatory purpose, required under *Washington v. Davis*, 462 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252.

As applied in this case, the *Nevett II* "tort" is not an act, but inaction: the failure of the Commissioners *sua sponte* to change their form of government to guarantee proportional representation by race.

In this case, the record reflects vigorous black political participation: endorsing white candidates, constituting the "swing" vote in the most recent contested elections, and success in dealing with white incumbent officials after election day to secure black needs.

[6]*Nevett II*, 571 F.2d at 217-18.

[7]*Nevett II*, 571 F.2d at 220-21.

The record reflects no change in the at-large electoral system of Mobile since 1911; proposed changes to a mayor-council form were defeated in referenda in 1963 and 1973. The record reflects the substantial justification and constitutional necessity of the Commission form of government which includes new factors which have never been reviewed by this Court as to their constitutional significance.

Mobile's 1970 population was 190,026, with approximately 35.4% of its residents black.

In 1911, the City adopted, pursuant to Ala. Act 281 (1911), its present three-member Commission Government. Each Commissioner performs both legislative and specific City-wide administrative functions as head of one of three municipal departments: Finance and Administration, Public Safety, and Public Works and Services (571 F.2d at 241-42,App. A, pp. 3a-4a; 423 F. Supp. 386,App. B, p. 5b).[8] Because each Commissioner administers a separate department with City-wide functions, each of constitutional necessity is elected at-large by the entire electorate.[9]

[8]Prior to 1965, assignment of administrative responsibilities was by agreement of the Commissioners among themselves. In 1965, this longstanding practice was codified under Ala. Act 823 (1965) to add one of these three functional designations to the already numbered place on the ballot for which every candidate had to announce and run, thus informing the voters of the area of municipal services for which the candidates sought responsibility.

[9]Under the Court-ordered plan, in contrast, the Mayor becomes an elected chief executive who oversees an executive branch of non-elective officials (App. D, Art. IV, Sect. 32, p. 26d), while the City Council becomes a purely legislative body which may deal with City administration "solely through the mayor" (App. D, Art. III, Sect. 16, p. 14d).

This being so, the decision of which review is sought if upheld by this Court sounds the death knell of the Commission form of government now in force in hundreds of municipalities in our nation. Any change in the administrative structure of the City would be considered submissible under the Voting Rights Act.[10] The Attorney General of the United States would perforce disapprove the change, because of longstanding objection to the at-large election requirement of the Commissioners.

This case, therefore, involves the inability of any Commission form City to alter its administrative structure[11] without Federal approval. And it in fact renders most commission forms of government unconstitutional as all commission government cities have small or large numbers of minorities among their residents.

A. Mobile's Form of Government Was Adopted With Racially-Neutral, Good Government Purposes.

Mobile's Commission Government was adopted in 1911

[10]Both the District Court and the Court of Appeals below (see 571 F.2d at 242 n. 3; App. A, p. 4a) took great pains to limit their holdings to the constitutional challenge to the at-large system in Mobile. The Attorney General had disapproved a Voting Rights Act submission (under jurisdictional protest) of the designation of functional duties of each Commissioner, on the ground solely that the Commission form "locks the city into the use of the at-large system." The Court of Appeals in this case treated the submission only as circumstantial evidence of intent to maintain the Commission form, extant since 1911. (571 F.2d at 241 n. 2; App. A, p. 3a).

[11]The Commission form is unique in electing all its administrative department heads.

It is for this reason that the remedial Order in this case is unique in its breadth. (App. D)

within the context of the progressive reform movement which prompted many other municipalities through the Nation to do likewise. (Tr. 24-25). Mobilians, like citizens of other cities swept by the reform movement, sought a city government both more efficient and business-like, and less susceptible to ward parochialism and corruption than the aldermanic or councilmanic forms. (Tr. 24-25, 36-37).

Both Courts accepted the legitimacy of at-large elections as a means of assuring City-wide perspective and representation by elected officials (423 F. Supp. at 403, App. B, p. 43b; 571 F.2d at 244, App. A, p. 9a). In the words of the Court of Appeals, the City's existing form of government was "neutral at its inception" (571 F.2d at 246, App. A, p. 13a).

B. Mobile's Electoral System Is Entirely Open To Participation By Black Citizens, Who Do In Fact Participate Actively And Exercise Significant Voting Power.

In Mobile, every phase of the electoral process—registration, voting, and qualification for candidacy—is as open to blacks as to whites. (423 F.Supp. at 387; App. B, p. 76). In Mobile, "any person interested in running for the position of city commissioner is able to do so." (423 F.Supp. at 399; App. B, p. 35b).

Beneath this "first blush" neutrality, the District Court found that "[o]ne indication that local electoral processes are not equally open is the fact that no black has ever been elected to the at-large City Commission." (423 F.Supp. at 387-88; App. B, p. 7b). Drawing upon statistical evidence that voting in the City had been polarized along racial lines (423 F.Supp. at 388-89; App. B, pp. 7b-11b), the Court found:

> "Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life." 423 F.Supp. at 388 (App. B, p. 10b).[12]

But in Mobile, no black candidate for the Commission has ever suffered defeat as a result of polarized voting. As the District Court recognized, only three blacks had sought election to the Commission; and they "were young, inexperienced, and mounted extremely limited campaigns." (423 F.Supp. at 388; App. B, p. 8b). These candidates were of such limited appeal even to black voters that they admittedly failed even to carry predominantly black census wards (Tr. 175).

In the view of the District Court, this failure of qualified black candidates even to try the political process was attributable to discouragement at their perceived chances for victory in at-large City elections (423 F.Supp. at 389; App. B, p. 11b). The District Court did not address these undisputed facts of record—often adduced through Plaintiffs' own witnesses—which clearly demonstrate that blacks do participate actively and effectively in City politics:

> 1. Commission candidates actively seek black votes, and the endorsement of the Non-Partisan Voters League ("NPVL"), the City's principal black political organization (Tr. 264, 320-22, 412-414, 539-40, 752, 824, 927, 1141).

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[12]The Court relied upon the testimony of "active candidates for public office," and upon Plaintiffs' statistical evidence of racially polarized voting (423 F. Supp. at 388; App. B, p. 9b-10b).

2. In the City's most recent elections, held in 1973,[13] two of the three present Commissioners ran and won with the endorsement of the NPVL. The third Commissioner ran unopposed.
3. One of the present Commissioners was elected on the strength of the black "swing" vote (Tr. 413-14).

The District Court did note that one past Commissioner, a white "identif[ied] with attempting to meet the needs of the black people of the city", had been elected and re-elected with black support during the over 25-year period from 1953 to 1969 (423 F.Supp. at 388; App. B, p. 9b).[14]

C. The Courts' Treatment Of The Issue Of Racial Purpose Or Intent

Although the District Court relied entirely upon the Equal Protection Clause of the Fourteenth Amendment in invalidating Mobile's at-large commission form of government (423 F.Supp. at 402-03; App. B, pp. 40b-42b), the Court held that the principle of *Washington v. Davis*, 426 U.S. 229, 242—that facially neutral government actions must be shown to be not simply racially disproportionate in impact, but the result of invidious racial purpose—had no application in a voting "dilution" case such as this (423 F.Supp. at 394-398; App. B, pp. 22b-32b). However, the Court went on to make ancillary findings involving application of a "tort standard" of proof of intent.

[13]This was the election in which the three "young, inexperienced" black candidates ran (423 F.Supp. at 388; App. B, p. 8b).

[14]Though the Court's opinion attributes his ultimate defeat in 1969 to white "backlash" and polarized voting (423 F.Supp. at 388-89; App. B, p. 9b), the testimony of the former Commissioner himself attributes his defeat to the failure of black voters to turn out at the polls (Tr. 299-304).

The District Court acknowledged that the City's government was racially neutral at its inception in 1911, but offered this remarkable "tort" analysis:

> "A legislature in 1911, less than 50 years after a bitter and bloody civil war which resulted in the emancipation of the black slaves, should have resonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large election system imposed in 1911." 423 F.Supp. at 397 (App. B, p. 29b).

The District Court's second ancillary finding on intent involved a permutation of its tort theory applied to State legislative "inaction." Finding that the Alabama Legislature, when faced with redistricting bills, had in the past showed concern over their impact on election of black candidates, and had avoided redistricting itself until Federal court order in 1972, the Court concluded that in Mobile

> "There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as intentional State action . . ." 423 F.Supp. at 398 (App. B, p. 31b) (emphasis original).

The Court did not suggest that, but for racial animus, the City would now have a different form of government.[15]

The Court of Appeals held, as the District Court had not, that proof of invidious racial purpose is here a necessary element under *Washington v. Davis, supra*, and subse-

[15]The Court did not rely upon the fact that in 1963 and again in 1973, the people of Mobile rejected proposals to change from the commission form to a mayor-council government. (R. 435)

quent cases of this Court following its principle.[16] Nonetheless, the Court held that the element of intent had been properly established.

First, the Court of Appeals held that the findings of the District Court under its *Zimmer* analysis "compel the inference that the [at-large commission] system has been maintained with the purpose of diluting the black vote . . ." (571 F.2d at 245; App. A, p. 12a). Second, the Court concluded that the finding that the Alabama legislature had failed to change the City's at-large Commission Government, coupled with a general legislative awareness that districting has "racial consequences," constituted "direct evidence of the intent behind the maintenance of the at-large plan." (571 F.2d at 246; App. A, p. 14a). Finally, the Court relied upon the 1965 Act designating specific functions (which the District Court had found desirable and conducive only to the voters' "intelligent choice", 423 F.Supp. at 394 n. 9; App. B, p. 21b) as further probative of an invidious "intent to maintain the plan . . ." (571 F.2d at 246; App. A, p. 14a).

The Court of Appeals also gave no indication that the City would now be operating under some other mode of government were it not for the racial animus imputed to the Legislature.

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[16]The reasoning of the Court of Appeals is developed at length in the companion case of *Nevett v. Sides* (*Nevett II*), 571 F.2d 209, 217-221, and incorporated by reference in its *Mobile* decision. 571 F.2d at 241 (App. A, p. 2a).

The District Court had rendered its decision prior to such cases as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252; *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144; *Board of School Commissioners of Indianapolis v. Buckley*, 429 U.S. 1068; and *Austin Independent School District v. United States*, 429 U.S. 990.

D. The Remedy Ordered, and Subsequent Proceedings

Because at-large elections are an integral and legally indispensable feature of the City's Commission Government, the District Court felt obligated to disestablish the City's present government, and substitute another form to "provide blacks a realistic opportunity to elect blacks to the city governing body" (423 F.Supp. at 403; App. B, p. 42b).[17]

The District Court ultimately ordered implementation of a "strong mayor-council" plan in which the 9-member council is to be elected by single-member district, with the mayor to be elected at-large (App. D, pp. 7d-8d). The Court-ordered plan is so comprehensive as to constitute a new City Charter, setting not only the form of government and electoral system, but such details as salaries and budget procedures (App. D, pp. 12d-13d, 25d, 30d-41d).

Recognizing the substantial disruption to the City and its citizens should its order be reversed on appeal, the District Court stayed its order pending appeal; and at oral argument, the Court of Appeals stayed the holding of all elections pending appeal (571 F.2d at 242; App. A, pp. 5a-6a).

Upon its affirmance of the holding and the propriety of the relief ordered below, the Court of Appeals reinstated the remedial order of the District Court and dissolved its own

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[17]The Court rejected as "undesirable" the "weak mayor-council" plan available under State law, even where elected by single-member district (423 F. Supp. at 404; App. B, p. 45b).

stay of elections (571 F.2d at 247; App. A, p. 17a).[18]

By order of May 31, 1978, the District Court has set November 21, 1978, as the time for election of Mobile's new mayor-council government. However, the order provides that these elections shall be stayed if this Court grants review before that date. (App. E, p. 3e).

THE QUESTIONS ARE SUBSTANTIAL

This case is the first to come before this Court in which an entire form of government, not merely the manner of its election, has been struck down by the Federal courts under the constitutional rubric of "dilution" of black votes.[19] Earlier cases have involved the validity of at-large or multimember districting in circumstances where the form of government was equally able to exist and function under other electoral plans such as pure single-member districting.[20]

[18]Appellants sought from the Court of Appeals a Stay of Mandate pending their seeking review in this Court. The motion was denied on April 24, 1978. Whereupon, Appellants sought by application to Mr. Justice Powell, as Circuit Justice, a Stay and Recall of Mandate pending review. This application was denied on May 15, 1978, after referral to the Court, of which only Mr. Justice Stewart and Mr. Justice Rehnquist would have granted application.

[19]Particularly in a case such as this, involving not only the form and structure of local government but the constitutional guarantees of citizen participation in selecting officials, it is especially important

> "to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review [for] which this Court sits." *Watts v. Indiana*, 338 U.S. 49, 51.

The instant case illustrates how far the "denial of access" test in *White v. Regester* has been carried: undisputed evidence of active and effective black political participation in an electoral system concededly neutral on its face and free of formal impediments to blacks' registering, voting, and becoming candidates is to be deemed constitutionally deficient "access to the political process" where the courts conclude that black voters are presently unable to elect black officials in an at-large electorate found to be racially polarized and the blacks are not numerous enough to elect a black.

In effect, the Courts below have given controlling constitutional significance to the effects of racially polarized voting,[21] contrary to *United Jewish Organizations v. Carey*, 430 U.S. 144, 166-67; and in so doing, have effectively required that electoral systems be so structured as to guarantee the election of minority candidates, contrary to *White v. Regester, supra*, 412 U.S. at 765-66, and *Whitcomb v. Chavis, supra*, 403 U.S. at 153. If continuation of a neutral and reasonable governmental policy or action even with awareness of its racial effects actually required the conclusion of invidious racial intent,

[20]In *White v. Regester*, 412 U.S. 755, for example, this Court for the first time upheld the disestablishment of multimember legislative districts under Fourteenth Amendment equal protection principles, affirming holdings below that Texas' electoral system "effectively excluded" Dallas County blacks and "effectively removed" Bexar County Mexican-Americans from the political process. 412 U.S. at 767, 769.

[21]In contrast to its application to the facts of this case, the Fifth Circuit's test, articulated in *Nevett II*, takes polarized voting merely as the starting point for further constitutional analysis. 571 F.2d 209, 223 n. 16.

this Court's decisions in *Washington v. Davis* and *Village of Arlington Heights* would necessary have reached different outcomes.

This case, being the first one to present to this Court the constitutionality of the commission form of local government, has national importance far beyond the City's boundaries. Hundreds of other local governments also employ commission forms of government; over 67% of all city governments and over 40% of all county governments employ at-large elections.[22] The holdings below, if affirmed, portend the substantial erosion of local governments' necessary flexibility in structuring their electoral systems to satisfy their legitimate and racially neutral need for officials with the area-wide perspective afforded by elections at-large.

A. The Courts Below Have Erroneously Created A Constitutional Guarantee Not Of Effective Political Participation, But Of Certain Political Victory.

This Court has rejected the proposition that "a white official represents his race and not the electorate as a whole and *cannot* represent black citizens." *Vollin v. Kimbel*, 519 F.2d 790, 791 (4th Cir. 1975) (emphasis original), citing *Dallas County v. Reese*, 421 U.S. 477 and *Dusch v. Davis*, 387 U.S. 112. *A fortiori*, no racial group has a constitutional right to elect minority officials "in proportion to its voting potential." *Regester, supra*, 412 U.S. at 765; *Whitcomb v. Chavis, supra*, 403 U.S. at 153; *Beer v. United States*, 425 U.S. 130, 136 n. 8. The protected right is that of effective access to, and participation in, the

[22]Appellants are aware of 80 reported dilution cases.

political process. *Chavis, supra*, 403 U.S. at 149-155; *Regester, supra*, 412 U.S. at 766.

Nor is this right impermissibly infringed where a minority finds itself consistently outvoted at the polls, even where the elections happen to be characterized by racially polarized voting. *United Jewish Organizations of Williamsburgh, Inc. v. Carey, supra*, 430 U.S. at 166; *cf. Chavis, supra*, 403 U.S. at 153. Contrary to the decision here appealed, in this Court's decisions the focus of the proper constitutional test remains minority political access and participation, *Chavis, supra*, at 149-156.

1. To disregard active and effective black political participation simply because it produces white officials is fundamental constitutional error.

The District Court, upon concluding that a minority of black citizens were presently unable to elect black City Commissioners, deemed it unnecessary to address, much less consider, the undisputed evidence of effective black political participation and electoral clout (see *supra*, pp. 10-12). Such a lapse is explicable only if the Court labored under the erroneous assumption that only black participation which led to the election of black Commissioners could indicate constitutionally sufficient access to Mobile's political process.[23]

[23]The implicit view of the District Court here was openly expressed by the Court in *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, 71 F.R.D. 623 (W.D. La. 1976), which considered similar facts — (1) open slating, (2) black vote sought by all candidates, and (3) black votes clearly influential and sometime the decisive "swing" vote — but did not

> "view this as the sort of meaningful access to political processes intended by the fourteenth Amendment as interpreted by *White [v. Regester]* . . ." 71 F.R.D. at 635.

(continued)

This is patently *not* a case in which the power of the City's black electorate has been effectively "submerged." No black candidate for the Commission has ever received the full support of the black community only to be defeated by racially polarized voting (see *supra*, p. 11). Indeed, unless one makes an official's race the litmus test of his representativeness,[24] it is clear that black Mobilians have long enjoyed representation roughly proportionate to their numbers, *i.e.*, one Commissioner indisputably responsive to black interests served continuously from 1953 to 1969; and in 1973, black voters chose the winners in the only two contested Commission seats in preference to less experienced candidates of their own race (see *supra*, pp. 11-12).

(footnote continued from preceding page)

The Fifth Circuit has remanded the *Shreveport* case for further explication of the Court's *Zimmer* findings under F.R.Civ.P. 52(a). 571 F.2d 248, 255.

If a constitutional violation can exist apart from the failure of qualified black candidates to be elected, then the evil must be as described by the Fifth Circuit in *Nevett II*:

> "Perhaps the most useful approach to analyzing the *Zimmer* criteria as they relate to the existence of intentional discrimination is to assume that an at-large scheme is being used as a vehicle for achieving the constitutionally prohibited end. The objective of such a scheme would be to prevent a group from effectively participating in elections so that the governing body need not respond to their needs. This objective would be achieved by insuring that a cohesive group remains a minority in the voting population, thus preventing that group from electing minority representatives or from holding nonminority representatives accountable." 571 F.2d at 222.

[24]In the uniform experience of Plaintiffs' own witnesses, one or more Commissioners was personally available to hear black needs or grievances; and, more often than not, this access produced positive tangible results — street lighting, paving, sewers and sidewalks. (Tr. 433-34, 572-73, 583, 621-25).

2. The courts below have erroneously given present inability of blacks, a minority of the voters, to elect black officials the status of constitutional violation, contrary to *Whitcomb v. Chavis*, *White v. Regester*, and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.

Though the absence of serious black candidacies was not attributable to any formal barrier and the Commission races are open to "any person interested" (*supra*, p. 10), the District Court accepted the bootstrap argument of Plaintiffs below—the failure of prospective black candidates even to try the City's political processes was deemed to have constitutional significance. Thus, the District Court found, there exists in Mobile "a pattern of racially polarized voting" which "discourage[s] black citizens from seeking office or being elected." (423 F.Supp. at 389; App. B, p. 11b).

The "black discouragement" theory, of course, served in lieu of proof that any black Commission candidate had ever been defeated by polarized voting, and allowed proof of the very existence of polarized voting in Commission races to depend on statistical analyses of the votes cast for white candidates. The Court of Appeals uncritically accepted this substitution of "discouragement" for the more concrete barriers[25] to black candidacy and participation required by this Court. In the electoral system upheld in *Whitcomb v. Chavis*, for example, blacks had ample reason to be discouraged at their prospects for political victory; and there is no reason to suppose that discouragement would

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[25]In *White v. Regester*, *supra*, 412 U.S. at 766-67, for example, black candadacies had been effectively blocked by a white slating organization, descendant of the white primaries.

have served in lieu of white control of the slating process[26] as a factor supporting invalidation of the electoral scheme struck down in *White v. Regester.*

Even if racially polarized voting were a political fact of life in Mobile, it would not render an otherwise neutral electoral system constitutionally infirm.[27]

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[26]In contrast to the partisan primaries requiring invalidation in *Regester,* elections are non-partisan in Mobile. This is considered an essential reform feature of the Commission form. C. Adrian & C. Press, *Governing Urban America* 221 (4th ed. 1972). The strong-mayor form, ordered by the District Court below, is characterized by partisan elections and intense mayoral political activity while in office. J. Straayer, *American State & Local Government* 238 (1974).

Nonpartisan elections, as well as at-large elections, are essential features of the council-manager form. Council-manager was the successor reform movement to the commission form. International City Management Ass'n, *Municipal Year Book* 68-69 (1976).

Therefore, this case will affect not only the Commission reform, but also the Council-Manager reform.

[27]

"Where it occurs, voting or for against a candidate because of his race is an unfortunate practice. But it is not rare: and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district. However, disagreeable this result may be, *there is no authority for the proposition that the candidates who are found racially unacceptable by the majority and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process.* Their position is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line." *United Jewish Organizations, supra,* 430 U.S. at 167-77 (emphasis added).

B. The Courts' Conclusion That The Maintenance Of Mobile's Existing Form Of Government Is Tainted With Invidious Racial Purpose Cannot Be Squared With *Washington v. Davis* And Other Recent Cases Of This Court Requiring Such Purpose Be Shown.

A principal error in the majority opinion's legal analysis is clearly expressed in the concurring opinion of Wisdom, J., in the companion case of *Nevett II,supra*, 571 F.2d at 232-33:

> "I agree that it is reasonable to argue, for example, that proof of the invidious effects of multi-member districts or at-large voting raises an inference, perhaps, in some cases, a strong presumption, of discriminatory purpose. That formulation is run-of-the mine, acceptable, legal semantics—in some cases. It will not cover those cases in which the voting scheme was neutral when initiated or even benign but had unintended or inadequately considered invidious effects on the voting rights of minorities. In those cases, as the majority was driven to say, the discriminatory purpose is found in maintaining the voting plan, that is, taking no affirmative curative action. This view of inaction *is* inconsistent with *Washington v. Davis.*" (emphasis original).

The role of the constitutional requirement that invidious purpose be shown is to protect the ability of government to function by facially neutral actions which serve rational and legitimate ends, but which incidentally operate with racially disproportionate impact. *Davis, supra*, 426 U.S. at 248. An inadequate standard of proof can subvert this vital rule as absolutely as its disregard.

1. The courts' tort standard of proof renders vulnerable even the continuation of facially neutral government practices supported by entirely legitimate and racially neutral policies, wherever there is general awareness of racial effect.

Both Courts below found that the City's existing form of government, together with its at-large electoral system necessarily attendant thereto, are facially neutral and were adopted for racially neutral, good-government purposes at a time when invidious racial motivations could have played no part (see *supra*, pp. 9-10). Yet the holding below deems the failure to alter Mobile's existing governmental structure (its "maintenance"), coupled with imputed legislative awareness that blacks might fare better politically under elections by single-member district, compelling proof of racial purpose.

This Court's recent decisions condemn this approach. For example, if awareness of racially disproportionate impact were equivalent to an invidious intent to accomplish such impact, the outcome of *Washington v. Davis*, where the police department continued to administer its employment test despite its awareness that a disproportionate number of black applicants failed, 426 U.S. at 252, would necessarily have been different. Similarly in *Village of Arlington Heights*, zoning officials were well aware that existing policies had the effect of maintaining the "nearly all white" status of the village, and the Court of Appeals had held that they "could not simply ignore this problem," 429 U.S. at 260. Yet this Court upheld the maintenance of these policies for reasons racially neutral, despite their exclusionary effect.

This Court has correctly observed that "viable local governments may need considerable flexibility in local arrangements" in order to meet local needs. *Abate v. Mundt*, 403 U.S. 182, 186-87 (1971). At-large electoral systems, integral and constitutionally necessary to the commission form of government used by approximately 3% of this Nation's 18,500 municipalities, further valid governmental objectives and are entitled to at least "limited deference." *Wise v. Lipscomb*, ____ U.S. ____, 98 S.Ct. 15, 17 n. 2. (Powell, J., as Circuit Justice), *staying* 551 F.2d 1043 (5th Cir. 1977), *cert. granted*, ____ U.S. ____, 98 S.Ct. 716.

This is the function of the purpose or intent as applied in *Washington v. Davis* and *Village of Arlington Heights*—to assure that government actions which are designed to further valid objectives are accorded such deference, and that those designed to further impermissible racial purposes are not. *Davis, supra*, 426 U.S. at 242-248; *Arlington Heights, supra*, 429 U.S. at 265-66.

However, where the challenged action is indeed necessary to serve valid ends, *i.e.*, here to prevent corruption, it is insufficient to show that it has been "motivated in part by a racially discriminatory purpose." *Id.* at 270 n. 21. Where such an action "would have resulted" even absent a racial purpose, it can not be fairly attributed to racial motivations and "there would be no justification for judicial interference . . ." *Id. See Davis, supra*, 426 U.S. at 253 (Stevens, J., concurring); *see also Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87.

The test of invidious intent applied below stands

"deference" on its head. The City's long history of incorrupt Commission Government is anomalously used to rationalize its abolition. See 571 F.2d at 244 (App. A, p. 10a).

2. The courts' tort standard effectively imposes an affirmative duty of racially-conscious electoral restructuring upon legislatures, lest maintenance of the status quo be deemed invidiously discriminatory.

The essence of the Court of Appeals' holding is that where application of its *Zimmer* criteria indicates a current condition of voting dilution, the maintenance of such a system without affirmative corrective action compels the inference of purposeful dilution (571 F.2d at 245; App. A, p. 12a).

The creation of such an "affirmative duty" might be compared to that imposed upon school boards following this Court's second decision in *Brown v. Board of Education*, 349 U.S. 294, 299 (*Brown II*). School boards which had operated State-compelled dual school systems were

> "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38.

Yet such school systems had been adjudged unconstitutional *per se*. *Brown II, supra*, 349 U.S. at 298.

In contrast, at-large and multi-member electoral systems are clearly not unconstitutional *per se*. *Whitcomb v.*

Chavis, supra, 403 U.S. at 159-60; *White v. Regester*, 412 U.S. at 765.[28]

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[28]Even in the context of mandatory redistricting to conform to the one man-one vote principle, neither the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.*, nor the Constitution requires legislative elimination of at-large electoral components. *Beer v. United States*, 425 U.S. 130, 138-39, 142 n.14. And, by implication, this failure to eliminate at-large seats required no inference that the reapportionment was tainted with racial purpose. *Id.*

It is equally clear that even where minority voters are in fact substantially disadvantaged in their ability to elect minority candidates by an existing electoral plan in the presence of racially polarized voting, no *per se* constitutional violation exists and there arises no constitutional or statutory duty of "affirmative action" by the legislature to correct the situation. *United Jewish Organizations, supra*, 430 U.S. at 166-67. Yet the Court's decision in effect retroactively imposes just such a duty here.

CONCLUSION

On the substantial issues of new and novel constitutional and Federal law presented herein by the commission form of government and its record in Mobile, the Court should note probable jurisdiction.

Because the District Court has ordered elections under the newly imposed mayor-council plan to take place on November 21, 1978, but has indicated that these elections will be stayed if this Court shall earlier grant review, Appellants urge that this Court note jurisdiction of this appeal as promptly in the October 1978 Term as possible.

Respectfully submitted,

Of Counsel:

Hand, Arendall, Bedsole, Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601

C.B. Arendall, Jr.
William C. Tidwell, III
Travis M. Bedsole, Jr.
Post Office Box 123
Mobile, Alabama 36601

Legal Department of the City of Mobile
Mobile, Alabama 36602

Fred G. Collins
City Attorney
City Hall
Mobile, Alabama 36602

Rhyne & Rhyne
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Charles S. Rhyne
William S. Rhyne
Donald A. Carr
Martin W. Matzen
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
Counsel for Appellants

APPENDIX A

Wiley L. BOLDEN et al.,
Plaintiffs-Appellees,

v.

CITY OF MOBILE, ALABAMA, et al.,
Defendants-Appellants.

Nos. 76-4210, 77-2042.

United States Court of Appeals,
Fifth Circuit.

March 29, 1978.

Appeals from the United States District Court for the Southern District of Alabama.

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

This is the second of four consolidated voting dilution cases we decide today. *See Nevett v. Sides (Nevett II),* 571 F.2d 209, 213 n.1 (5th Cir. 1978). Black citizens of Mobile, Alabama, brought this class action to challenge the constitutionality of their city's at-large method of electing its commissioners. The district court sustained the challenge, declared the city's commission government unconstitu-

tional, and ordered the establishment of a mayor-council plan requiring that councilmen be elected from single-member districts. *Bolden v. City of Mobile,* 423 F.Supp. 384 (S.D.Ala.1976). The city and its commissioners take this appeal, asserting that the district court erred in its conclusion that the at-large commission elections impermissibly diluted the votes of black Mobilians and in its ordering of the single-member plan. We find the appellants' arguments unpersuasive and therefore affirm the judgment below.

The district court's opinion sets forth the factual background of this case in detail and at length. 423 F.Supp. at 386-94. Therefore, we will discuss only the salient findings below. We also incorporate the portions of our opinion of today in *Nevett II* that explicate the legal principles applicable to voting dilution cases.[1]

I.

A city commission consisting of three members, all of whom are elected at-large, governs the City of Mobile. Government by commission of this type was established in 1911 by state law, 1911 Ala.Acts no. 281, which requires

[1]The *Nevett* opinion to which we refer is that of the second appeal in the case. We therefore denominate it *Nevett II.* The first appeal, *Nevett v. Sides (Nevett I),* 533 F.2d 1361 (5th Cir. 1976), reversed a judgment for the plaintiffs and remanded the case to the district court. On remand, the court rendered judgment holding the at-large scheme constitutional. On the second appeal, we examined at length the principles that govern dilution cases and concluded that the district court's judgment for the defendants should be affirmed. To avoid needless repetition, we adopt in this case our prior discussion of the dilution principles. In particular, we incorporate Parts I and II of the opinion.

commission candidates to run for numbered positions and win by majority vote. Commission elections are nonpartisan, and therefore there are no primaries. There is no requirement that commissioners reside in specified subdistricts.

In 1965, a specific city-wide function was assigned to each position by statute.[2] 1965 Ala.Acts no. 823. These functions

[2]On May 14, 1975, approximately three weeks before the commencement of this action, the City of Mobile submitted several statutes of the 1971 Regular Session of the Alabama Legislature to the Attorney General of the United States for approval under §5 of the 1965 Voting Rights Act, 42 U.S.C. §1973c (1970). Among these statutes was Act 429, which amended the 1965 Act that assigned the specific functions to the commission positions, 1965 Ala.Acts no. 823. The Attorney General noted that Act 823 had not been tendered to him for approval under §5, and he therefore requested that the Act be submitted.

On December 30, 1975, some seven months after the commencement of this action, the City of Mobile submitted Act 823 for the consideration of the Attorney General, although reserving the objection that the act was not subject to §5 approval. The Attorney General interposed an objection to the Act's assignment of specific functions to the commission positions because it

> locks the city into use of the at-large system of electing [its] commissioners since it would not be appropriate to permit a particular area of the City (as under a ward system of election) to have the exclusive right to elect a commissioner who would be responsible for administering functions for the whole city, for example, public safety.
>
> In view of this interpretation that [the provision] rigidifies use of the at-large system, incorporating as it does the numbered post and majority vote features, and in view of history of racial discrimination and evidence of racial bloc voting in Mobile, we are unable to conclude, as we must under the Voting Rights Act, that [the provision] will not have the effect of denying or abridging the right to vote on account of race or color.

Letter from Assistant Attorney General J. Stanley Pottinger to C.B. Arendall, Jr., Special Counsel to the City of Mobile, at 2-3 (March 2, 1976), Record, vol. 2, at 479-80.

(continued)

include the administration of the following departments: the Department of Finance and Administration, the Department of Public Safety, and the Department of Public Works and Services. Commissioners are elected for four year terms, and the mayoralty is shared equally among the commissioners during their terms.

On June 9, 1975, the appellees commenced this action to invalidate Mobile's city commission. They claimed that the at-large feature of commission races combined with the various electoral devices set out above operated to dilute their votes in violation of the first, thirteenth, fourteenth, and fifteenth amendments to the Constitution, of the Civil Rights Act, and of the Voting Rights Act.[3] The case went to trial in

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(footnote continued from preceding page)

The city has not brought suit in the District Court for the District of Columbia, as provided by §5, and therefore the function-assigning provision of Act 823 is in abeyance. As our subsequent discussion will show, the relevance of the Attorney General's objection is that it indicates the tendency of the function-assigning provision to perpetuate the at-large electoral system. The ultimate issue in this case is whether Mobile's at-large plan is being maintained with the design of diminishing black political input. The observation of the Attorney General constitutes circumstantial evidence that the legislature has recently and actively sought so to maintain the plan.

[3]Specifically, the appellees alleged violations of 42 U.S.C. §§1973, 1983, and 1985(3) (1970). The district court dismissed the §1983 claim against the city and §1985(3) claims against both the city and the commissioners. The court did not rest its final decision on the merits on any of the remaining statutory claims, but found the plan unconstitutional under the dilution precedents of the Supreme Court and this circuit, to wit, *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 294 (1976).

Although we acknowledge the general principle that federal courts should avoid decision on constitutional grounds if an adequate statutory ground is available, *e.g.*, *Wood v. Strickland*, 420 U.S. 308, 314, 95

(continued)

July of 1976, and the district court entered judgment for the appellees on October 22, 1976, ordering that the next city elections, scheduled for August, 1977, conform with a yet-to-be-determined mayor-council plan incorporating single-member council seats.[4] The court entered a remedial order on March 9, 1977, abolishing the commission government and expounding a mayor-council plan. On April 7, 1977, however, the district court stayed its injunction that had

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(footnote continued from preceding page)

S.Ct. 992, 43 L.Ed.2d 214 (1975); *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191, 29 S.Ct. 451, 53 L.Ed. 753 (1909), we will not upset the district court's judgment on this basis. "The doctrine is not ironclad," *Hagans v. Lavine*, 415 U.S. 528, 546, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), and to remand this fully litigated case would be a purposeless waste of judicial resources. The issue of constitutionality was fully developed at trial and, as the district court's thorough opinion evidences, was decisively determined in the appellees' favor under well established precedents. The statutory claim was at best problematic; this court knows of no successful dilution claim expressly founded on 42 U.S.C. §1973. Under similar circumstances, the Supreme Court has avoided an abusive application of the constitutional-decision-avoidance rule. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 629, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974). *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Moreover, a remand would not achieve the salutary objective of avoiding constitutional adjudication because we have already entertained the constitutional issues that govern this case in *Nevett II*. See note 1 *supra*. In *Nevett II* the complaint alleged no Voting Rights Act claim, and therefore we necessarily reached the constitutional issues. *See id.*, 571 F.2d at 213 n.3.

[4]The court solicited single-member plans from the parties. The plaintiffs submitted plans pursuant to pretrial order, but the defendants declined to submit a plan. The court requested that the parties submit recommendations for a three-member committee, whose duty would be to devise a detailed plan. The committee was formed and submitted a lengthy mayor-council proposal. Supp. Record, vol. 1, at 628-675.

ordered that the August elections conform to the mayor-council plan. We declined to dissolve this stay, and we stayed the holding of any city elections pending this appeal.

II

In concluding that Mobile's system of electing its city commissioners worked an unconstitutional dilution of the votes of black Mobilians, the district court relied upon the test set forth in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 294 (1976).[5] The court determined that the appellees established all the primary indicia of dilution except for the existence of a tenuous state policy

[5]We have discussed at length in *Nevett II* the import of *Zimmer's* multifactor circumstantial evidence test for dilution. We incorporate that discussion here, and for the convenience of the reader we restate the criteria that *Zimmer* requires the district courts to consider in dilution cases. The criteria going primarily to the issue of dilution of a group's votes, the "primary" factors, include: the group's accessibility to political processes, the responsiveness of representatives to the needs of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the electoral participation of the group. *Zimmer*, 485 F.2d at 1305. Those criteria that may enhance the underlying dilution, the "enhancing" factors, include: the size of the district, the portion of the vote necessary for election; if the positions are not contested for individually, how many candidates an elector must vote for (i.e., whether there is an anti-single shot rule); and whether candidates must reside in sub-districts. *Id.* "By proof of an aggregation of at least some of [the *Zimmer*] factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access." *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 143 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977).

behind the at-large plan. The evidence under the state policy criterion was found to be "neutral." 423 F.Supp. at 393. Under the enhancing criteria, the appellees demonstrated, and the court found, that Mobile is a large district (its 1970 population was 190,026, 35.4% of which was black), that the city has a majority vote requirement, that the commission candidates run for numbered positions, and that there are no subdistrict residency requirements. *Id.* at 393-94. We find the district court's determinations under the *Zimmer* criteria not clearly erroneous and the court's ultimate conclusion of dilution amply supported by its findings.

The district court gave careful consideration to each of the primary *Zimmer* criteria. It found a lack of black access to the political processes in Mobile. The court noted "massive official and private discrimination" prior to federal intervention in the form of the Voting Rights Act of 1965, 423 F.Supp. at 387, and found that although "[t]here are no formal prohibitions against blacks seeking office in Mobile . . ., the local political processes are not equally open to blacks." *Id.* No black had achieved election to the city commission due, in part, to racially polarized voting of an acute nature. Few blacks sought office because of the prospect of certain defeat in the at-large elections. *Id.* at 389. Although the failure of black candidates because of polarized voting is not sufficient to invalidate a plan, *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977); *McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976); *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975); *Robinson v. Commissioners Court*, 505 F.2d 674 (5th Cir. 1974), it is an indication of lack of access to the political processes. It is one piece of the circumstantial evidence

puzzle, whose successful completion supports the illation of dilution. *See Nevett II,* 571 F.2d at 224.

The district court determined that the city commissioners have been unresponsive to the needs of blacks in Mobile. The city has employed relatively few blacks in the higher levels of city service, and the city has been enjoined by federal court order to desegregate its fire and police departments and to open city facilities to allow equal accessibility to blacks. Various city committees whose members are appointed by the commission have evidenced a severe underrepresentation of blacks. As the court concluded, "[n]o effort has been made to bring blacks into the mainstream of the social and cultural life by appointing them in anything more than token numbers." 423 F.Supp. at 390.

The court found not only that the city had been insensitive to the need for black participation in city government but also that the commission had been less responsive to black areas than white ones with respect to providing municipal services. These services included temporary relief from drainage problems, construction and resurfacing of roads, and construction of sidewalks. The court was careful to consider and weigh all the evidence.

> Although the city has not been totally neglectful, and the expense and problems are monumental, there is a singular sluggishness and low priority in meeting these particularized black neighborhood needs when compared with a higher priority of temporary allocation of resources when the white community is involved.

423 F.Supp. at 392. The court also made note of incidents of police brutality against blacks, mock lynchings, and cross burnings. The city commission reaction was found to be

sluggish, evincing "a failure by elected officials to take positive, vigorous, affirmative action in matters which are of such vital concern to the black people." *Id.*

We think the evidence fairly supports a finding of unresponsiveness. The district court's task in considering evidence under the responsiveness criterion is a singularly factual one. Given the court's attentive consideration of the voluminous evidence on this issue, we cannot find its conclusion of unresponsiveness clearly erroneous. *See Nevett II,* 571 F.2d at 225.

As to the weight of the state policy behind at-large districting of city governments, the court found that the State of Alabama had no particular preference for such schemes.[6] Given the longstanding at-large feature of Mobile's commission government, however, the court concluded that the "manifest policy of the City of Mobile has been to have at-large or multi-member districting." 423 F.Supp. at 393. We appreciate the traditional deference the federal courts have accorded local governments, and we recognize "that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs." *Abate v. Mundt,* 403 U.S. 182, 185, 91 S.Ct. 1904, 1907, 29 L.Ed.2d 399 (1971). City-wide representation is a legitimate interest, and at-large districting is ordinarily an acceptable means of preserving that interest. *See Wise v. Lipscomb,* ____ U.S. ____, 98 S.Ct. 15, 18, 54 L.Ed.2d 41 (1977), *recalling mandate and staying judgment of* 551 F.2d 1043 (5th Cir.

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[6]The court cited the elective nature of Ala. Code tit. 37, §426 (Supp. 1973), which was the subject of our opinion in *Nevett II, see id.;* 571 F.2d at 213-14 n.4, as evidence of the neutrality of Alabama's at-large policy. 423 F.Supp. at 401.

1977). But the longevity of Mobile's at-large commission government cannot insulate it from review.

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S.Ct. 125, 130, 5 L.Ed.2d 110 (1960); *accord, Robinson v. Commissioners Court*, 505 F.2d 674, 680 (5th Cir. 1974). We think the district court was warranted in finding that the city's interests in its at-large plan did not outweigh the strong showings by the appellees under the other *Zimmer* criteria. The aggregate of the evidence controls. *Zimmer*, 485 F.2d at 1305. Indeed, that the at-large plan has existed for over sixty-five years is wholly consistent with the court's ultimate conclusion that the plan has been maintained with the purpose of debasing black political input.

The district court found that the evidence under the last of the primary factors enunciated in *Zimmer*, whether "the existence of past discrimination in general precludes the effective participation [by blacks] in the election system," *id.*, proponderated in favor of the appellees. Blacks were effectively disenfranchised prior to the enforcement of the Voting Rights Act of 1965. A catena of federal litigation was necessary to overcome official recalcitrance in maintaining various impediments to black political participation. Although blacks are able freely to register and vote in Mobile today, the district court found that the vestiges of past discrimination "preclude the effective participation of blacks in the election system today in the at-large system of electing city commissioners." 423 F.Supp. at 393.

The district court was justified in resolving the issue of the effects of past discrimination against the appellants. It is not enough that the less subtle means of diminishing black participation have been removed. As we admonished in *United States v. Texas Education Agency*, 532 F.2d 380 (5th Cir. 1976), *vacated and remanded on other grounds sub nom. Austin Independent School District v. United States*, 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed.2d 603 (1977), discriminatory official action is often clandestine and politic.

> Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official "will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive—for we deal with an area in which 'subtleties of conduct' . . . play no small part."

Id. at 388 (quoting *Holland v. Edwards*, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954)). Where, as here, past racial discrimination has been found to be pervasive and recent, it must be demonstrated "that enough of the incidents of the past [have] been removed, and the effects of past denial of access dissipated, that there [is] presently equality of access." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 144-45 (5th Cir.) (en banc) (footnote omitted), *cert. denied*, ___ U.S. ___, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977).

We need discuss only briefly the findings under the enhancing factors, since we have already outlined them. The electoral district, i.e., the City of Mobile, was found to be large; it is 142 square miles in area and had a population of 190,026 in 1970, 35.4% of which was black. The commissioners must be elected by majority vote, they run for numbered positions,[7] and they are not required to reside

[7] *See Nevett II*, 571 F.2d at 217 n.10.

in subdistricts. Thus, the findings under all the enhancing criteria enumerated in *Zimmer* (or similar ones, see note 5 *supra*) have been in favor of the appellees. The only mitigating fact is the absence of primaries for the commission races. In the aggregate, the existence of these factors compounds what was already a strong showing of dilution under the primary criteria.

The bottom line of the *Zimmer* analysis in this case is that the black voters in Mobile have prevailed under each and every criterion, with the exception of a demonstration that Mobile's policy favoring at-large commission districts is a weak one. Moreover, the finding under the policy criterion, although perhaps not providing additional impetus to the appellee's case, is consistent with the court's conclusion that the plan was maintained for discriminatory purposes.

We conclude that the district court's findings are not clearly erroneous and that these findings amply support the inference that Mobile's at-large system unconstitutionally depreciates the value of the black vote. Under our holding of today in *Nevett II*, these findings also compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and the fifteenth amendment, *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). Although we have treated the subject of intent at length in *Nevett II*, a few additional remarks are appropriate.

III

The city ardently asserts that since the 1911 plan was enacted under "race-proof" circumstances, it is immune from constitutional attack. Blacks had been effectively disenfranchised by the Alabama constituion in 1901, and therefore the at-large plan is said to have been adopted in a context where racial considerations could not have been relevant. *See Nevett II; McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976). The city would have us interpret *Washington v. Davis* and *Arlington Heights* to require a showing of intentional discrimination in the enactment of the plan. We squarely reject this contention in *Nevett II*, as it was rejected by the en banc court in *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.), *cert. denied*, ____ U.S. ____, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). *Kirksey* held that an innocently formulated plan that perpetuates past intentional discrimination is unconstitutional. In *Nevett II*, we noted that a plan neutral at its inception may nevertheless become unconstitutional when it is maintained for the purpose of devaluing the votes of blacks. We also demonstrated that if the aggregate of the evidence under the *Zimmer* criteria indicates dilution, then the inference arises that the plan is being maintained with the requisite intent.

The at-large scheme that has governed Mobile since 1911 is archetypal of the intentionally maintained plan we contemplated in *Nevett II*. The findings of the district court under *Zimmer's* circumstantial evidence test led the court to conclude that "[t]here is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as . . . intentional state action." 423 F.Supp. at 398 (emphasis

in original). This, the district court held, was sufficient to support a finding of unconstitutionality. We agree.

Several additional facts buttress the court's inference that the at-large plan has been maintained with discriminatory intent. We mentioned above the 1965 act that assigned specific functions to the commission positions, 1965 Ala.Acts no. 823. See note 2 *supra* and accompanying text. The Attorney General, pursuant to the authority vested in him by section 5 of the 1965 Voting Rights Act, 42 U.S.C. §1973c (1970), suspended the provisions of Act 823 that provided for specific functions. He found that the provisions tended to lock in the at-large feature of the scheme because it would be inappropriate for officials with city-wide responsibilities to be elected from single-member districts. See note 2 *supra*. This recent action by the Alabama Legislature is probative of an intent to maintain the plan by injecting additional policy grounds that would justify, and perhaps insulate, the at-large feature of all of the commission seats.

The enactment of Act 823 gains additional significance when combined with the court's finding that the legislature was acutely conscious of the racial consequences of its districting policies. As the court found, "[t]he evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected." 423 F.Supp. at 397. This finding constitutes direct evidence of the intent behind the maintenance of the at-large plan. *See Arlington Heights*, 429 U.S. at 268, 97 S.Ct. 555. It coincides with the conclusion of intentional discrimination evidence adduced under the *Zimmer* criteria in this case. We think that the district court has properly conducted the "sensitive inquiry into such circumstantial

and direct evidence of intent as may be available" that a court must undertake in "[d]etermining whether invidious discriminatory purpose was a motivating factor" in the maintenance or enactment of a districting plan. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564.

IV

The remaining issue is the appropriateness of the district court's remedy. The court ordered the implementation of a mayor-council plan that established nine single-member council districts. The appellants contend that the court's order is violative of the tenth amendment, which provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.Const. Amend. X. We find this contention meritless.

The essence of the appellants' argument is that the district court, having found the city's at-large government unconstitutional, is powerless to remedy the violation. The city refused to come forward with a plan, forcing the district court to fashion a remedy. The district courts have been repeatedly admonished by the Supreme Court to avoid the employment of at-large seats in their remedial plans, unless some special circumstance requires that such seats be used. *E.g., East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976); *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); *Connor v. Johnson*, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). The absence of any special circumstances in this case left the district court with the remedy of implementing a single-member plan.

The exercise of the equitable power of the district court in remedying the unconstitutional infirmity in Mobile's commission plan does not contravene the tenth amendment. We have recognized the importance of flexibility in the form of local government, but flexibility is not absolute license. The abuse of local governmental power, when of the constitutional magnitude in this case, is a power "denied the States" by the Constitution within the meaning of the tenth amendment. The power to remedy the unconstitutional wrong is one "delegated to the United States by the Constitution." The Constitution expressly provides for federal court jurisdiction in claims "arising under this Constituion [or] Laws of the United States." U.S.Const. art. 3, §2. Congress has given the federal courts original jurisdiction over such claims. 28 U.S. C.A. §1331 (West Supp. 1977). Cases alleging unconstitutional infringement by a state of the right to vote are justiciable under the fourteenth amendment, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), as are cases asserting a violation by local governments, *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State." *Id.* at 479, 88 S.Ct. at 1118. Claims asserting abridgment of the right to vote on account of race were justiciable even before the advent of the reapportionment era ushered in by *Baker*. It was the racial gerrymander of the City of Tuskegee, Alabama, that was the subject of the fifteenth amendment claim in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). A concomitant to the ability of a court to hear a case is that it be able to decide the case and remedy a wrong, if found.

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> . . . . As with any equity case, the nature of the violation determines the scope of the remedy.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971).

The appellants refused to submit a plan; they cannot by their recalcitrance straight-jacket the district court. We think the remedial plan adopted by the court was within its equitable powers. The plan is a temporary measure. It will exist only until the state or the city adopts a constitutional replacement.

Having found the district court's resolution of the constitutional issues in this case to be correct, and having approved its remedial measures, we find the disposition below proper in all respects. Therefore, the judgment of the district court is AFFIRMED. The injunction of the district court ordering that elections be held in conformance with its order is hereby REINSTATED, and our stay of the conducting of municipal elections is hereby DISSOLVED.

AFFIRMED.

WISDOM, Circuit Judge, specially concurring:

I concur specially for the reasons stated in my concurring opinion in *Nevett v. Sides (Nevett II)*, 571 F.2d 209, with which this case is consolidated.

APPENDIX B

Wiley L. BOLDEN et al., Plaintiffs,

v.

CITY OF MOBILE, ALABAMA, et al.,
Defendants.

Civ. A. No. 75-297-P.

United States District Court,
S.D. Alabama, S.D.

Oct. 21, 1976.

As Amended Oct. 28, 1976.

OPINION AND ORDER

PITTMAN, Chief Judge.

This action is brought by Wiley L. Bolden and other black plaintiffs representing all Mobile, Alabama, blacks as a class, claiming the present at-large system of electing city commissioners abridges the rights of the city's black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States; under the Civil Rights Act of 1871, 42 U.S.C. §1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, *et seq.*

Plaintiffs alleged that the existing commission form of government elected at-large "... discriminates against black residents of Mobile in that their concentrated voting

strength is diluted and canceled out by the white majority in the City as a whole" with a consequent violation of their rights under the above Amendments to the Constitution. It is also claimed that their statutory rights under 42 U.S.C. §§1973, *et seq.* [Voting Rights Act of 1965] and 1983 [Civil Rights Act of 1871] were violated. Jurisdiction is premised upon 28 U.S.C. §1343(3) and (4).

This court has jurisdiction over the claims based on 42 U.S.C. §1983 against the City Commissioners and over the claims grounded on 42 U.S.C. §1973 against all defendants under 28 U.S.C. §1343(3)-(4) and §2201.

This cause was certified as a class action under Rule 23(b)(2), F.R.C.P., the plaintiff class being all black persons who are now citizens of the City of Mobile, Alabama.

A claim originally asserted under 42 U.S.C. §1985(3) was dismissed for failure to state a claim upon which relief can be granted.

Defendants are the three Mobile City Commissioners, sued in both their individual and official capacities.

The prayed-for relief consists of, (1) a declaration that the present at-large election system is unconstitutional, (2) an injunction preventing the present commissioners from holding, supervising, or certifying any future city commission elections, (3) the formation of a government whose legislative members are elected from single member districts, and (4) costs and attorney fees.

Plaintiffs claim that to prevail they must prove to this court's satisfaction the existence of the elements probative of voter dilution as set forth by *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd. *sub nom. East Carroll Parish School Board v.*

Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), contending *Zimmer* is only the adoption of specified criteria by the Fifth Circuit of the *White* dilution requirements.

The defendants stoutly contest the claim of unconstitutionality of the city government as measured by *White* and *Zimmer*. They contend *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), erects a barrier since the 1911 legislative act forming the multi-member, at-large election of the commissioners was without racial intent or purpose. They assert *Washington, supra*, 96 S.Ct. at 2047-49, which was an action alleging due process and equal protection violations, held that in these constitutional actions, in order to obtain relief, proof of *intent* or *purpose* to discriminate by the defendants must be shown. Defendants state, therefore, that since the statute under which the Mobile Commission government operates was passed in 1911, with essentially all blacks disenfranchised from the electorate by the Alabama 1901 constitution, there could be no intent or purpose to discriminate at the time the statute was passed. Alternatively, however, defendants contend that if *Washington* does not preclude consideration of the dilution factors of *White* and *Zimmer*, they should still prevail because plaintiffs have not sustained their burden of proof under these and subsequent cases.

Plaintiffs' reply is to the effect that *Washington* did not establish any new constitutional purpose principle and that *White* and *Zimmer* still are applicable. If, however, this court finds *Washington* to require a showing of racial motivation at the time of passage, or merely in the retention of the statute, plaintiffs contend they should still prevail, claiming the at-large election system was designed and is

utilized with the motive or purpose of diluting the black vote. Plaintiffs claim that the discriminatory intent can be shown under the traditional tort standard.

FINDINGS OF FACT

Mobile, Alabama, is the second largest city in Alabama located at the confluence of the Mobile River and Mobile Bay in the southwestern part of the state. Mobile's 1970 population was 190,026 with approximately 35.4% of the residents black.[1] 1973 Mobile County voters statistics estimate that 89.6% of the voting age white population is registered to vote, 63.4% of the blacks are registered. (Plaintiffs' Exhibit No. 7).

Mobile geographically encompasses 142 square miles. Most of the white residents live in the southern and western parts of the city, while most blacks live in the central and northern sectors (Plaintiffs' Exhibit No. 58). Housing patterns have been, and remain, highly segregated. Certain areas of the city are almost totally devoid of black residents while other areas are virtually all black. In a recent study by the Council on Municipal Performance, using 1970 block census data, Mobile was found to be the 95th most residentially segregated of the 109 municipalities surveyed (Plaintiffs' Exhibit No. 59). According to a study performed by the University of South Alabama Computer Center for the defendants, the housing patterns in the city are so segregated it is impossible to divide the city into three

[1]Defendants' Exhibit No. 12. According to the 1970 Federal Census, the City of Mobile had a total population of 190,026 of whom 35.4% or 67,356, were non-white. The evidence is clear that there are few non-whites other than blacks.

contiguous zones of equal population without having at least one predominantly black district (Plaintiffs' Exhibit No. 60). Segregated housing patterns have resulted in concentration of black voting power.

Mobile presently operates under a three person commission-type municipal government adopted in 1911. (Ala. Act No. 281 (1911) at 330). The commissioners are elected to direct one of the following three municipal departments: Public Works and Services, Public Safety, and Department of Finance.[2]

The commissioners run on a place-type ballot and are elected at-large by the voters of Mobile. While the commission candidates must be residents of Mobile, there is not now, or has there ever been, a requirement that each commissioner reside in a particular part of the city. The evidence clearly indicates that district residence requirements with district elections would be improvident and unsound for the commission form of government.

In addition to the specific position for which a commissioner runs, each is also responsible for numerous appointments to the 46 committees operating under the auspices of the city. Some appointments are completely discretionary with the commissioner whereas committees, such as the plumbing and air conditioning boards which require members with a certain amount of expertise, are filled with a nominee suggested by the local trade

[2]When adopted in 1911, Mobile's commission government did not specify that a candidate must choose the particular commission position for which he was running. Alabama Act No. 823 (1965) at 1539, however, *inter alia*, required candidates to run for a particular numbered position with specific duties. Each commissioner holds that position during the four years tenure with the mayorality rotating between commissioners every sixteen months.

association. Often, the appointing commissioner makes his appointment from the slate of nominees presented by the particular association. This means that if the nominating association does not propose a black as a committee member, the commissioner will not appoint one. It is, however, within the commission's power to modify or change the ground rules under which appointments are made.

In *Zimmer, supra,* aff'd. *sub nom. East Carroll Parish School Board, supra* ("... but without approval of the constitutional views expressed by the Court of Appeals."), the Fifth Circuit synthesized the *White* opinion with the Supreme Court's earlier *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), decision, together with its own opinion in *Lipscombe v. Jonsson*, 459 F.2d 335 (5th Cir. 1972) and set out certain factors to be considered.

Based on these factors as set out in *Zimmer, supra*, at 1305, the court makes the following findings with reference to each of the primary and enhancing factors:

LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS

Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965. It has only been since that time that significant diminution of these discriminatory practices has been made. The overt forms of many of the rights now exercised by all Mobile citizens were secured through federal court orders together with a moral commitment of many of its dedicated white and black citizens plus the power generated

by the restoration of the right to vote which substantially increased the voting power of the blacks. Public facilities are open to all persons. Job opportunities are being opened, but the highly visible job placements in the private sector appear to lead job placements in the city government sector. The pervasive effects of past discrimination still substantially affects political black participation.

There are no formal prohibitions against blacks seeking office in Mobile.[3] Since the Voting Rights Act of 1965, blacks register and vote without hindrance. The election of the city commissioners is non-partisan, i.e., there is no preceding party primary and the candidates do not ordinarily run under party labels. However, the court has a duty to look deeper rather than rely on surface appearance to determine if there is true openness in the process and determine whether the processes "leading to nomination and election [are] ... equally open to participation by the group in question ...." *White*, 412 U.S. at 766, 93 S.Ct. at 2339. One indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large city commission office. This is true although the black population level is in excess of one-third.

In the 1960's and 1970's there has been general polarization in the white and black voting. The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two

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[3]The qualifying fee for candidates for the city commission was found unconstitutional in *Thomas v. Mims*, 317 F.Supp. 179 (S.D.Ala. 1970). *See also U.S. v. State of Ala.*, 252 F.Supp. 95 (M.D.Ala. 1966) (three judge District Court panel) (poll tax declared unconstitutional).

white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs. When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.

Since 1962, four black candidates have sought election in the at-large county school board election. Dr. Goode in 1962, Dr. Russell in 1966, Ms. Jacobs in 1970, and Ms. Gill in 1974. All of these black candidates were well educated and highly respected members of the black community. They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in run-off elections.

Three black candidates entered the race of the Mobile City Commission in 1973. Ollie Lee Taylor, Alfonso Smith, and Lula Albert. They received modest support from the black community and virtually no support from the white community. They were young, inexperienced, and mounted extremely limited campaigns.

Two black candidates sought election to the Alabama State Legislature in an at-large election in 1969. They were Clarence Montgomery and T.C. Bell. Both were well supported from the black community and both lost to white opponents.

Following a three-judge federal court order in 1972[4] in which single-member districts were established and the state house and senate seats reapportioned, one senatorial district in Mobile County had an almost equal division between the black and white population. A black and white were in the run-off. The white won by 300 votes. There was

[4]*Sims v. Amos*, 336 F.Supp. 924 (M.D.Ala. 1972).

no overt acts of racism. Both candidates testified or asserted each appealed to both races. It is interesting to note that the white winner published a simulated newspaper with both candidates' photographs appearing on the front page, one under the other, one white, one black.

One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from the black support and his identification with attempting to meet the particularized needs of the black people of the city. He was again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.

In 1969, a black got in a run-off against a white in an at-large legislature race. There was an agreement between various white prospective candidates not to run or place an opponent against the white in the run-off so as not to splinter the white vote. The white won and the black lost.

Practically all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a white. Most of them agreed that racial polarization was the basic reason. The plaintiffs introduced statistical analyses known as "regression analysis" which supported this view. Regression analysis is a professionally accepted method of analyzing data to determine the extent of correlation between dependent and independent variables. In plaintiffs' analyses, the dependent variable was the vote received by the candidates studied. Race and income were the independent variables whose influence on the vote

received was measured by the regression. There is little doubt that race has a strong correlation with the vote received by a candidate. These analyses covered every city commission race in 1965, 1969, and 1973, both primary and general election of county commission in 1968 and 1972, and selected school board races in 1962, 1966, 1970, 1972, and 1974. They also covered referendums held to change the form of city government in 1963 and 1973 and a countywide legislative race in 1969. The votes for and against white candidates such as Joe Langan in an at-large city commission race, and Gerre Koffler, at-large county school board commission, who were openly associated with black community interests, showed some of the highest racial polarization of any elections.

Since the 1972 creation of single-member district, three blacks of the present fourteen member Mobile County delegation have been elected. Their districts are more heavily populated with blacks than whites.

Prichard, an adjoining municipality to Mobile, which in recent years has obtained a black majority population, elected the first black mayor and first black councilman in 1972.

Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life. This fact is shown by the removal of such a barrier, i.e., the disestablishment of the multi-member at-large elections for the state legislature. New single member districts were created with racial compositions that offer blacks a chance of being elected, and they are being elected.

The court finds that the structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process.

UNRESPONSIVENESS OF THE ELECTED CITY OFFICIALS TO THE BLACK MINORITY

The at-large elected city commissioners have not been responsive to the minorities' needs. The 1970 population of the city is 64.5% white and 35.4% black.[5]

The City of Mobile is one of the larger employers in southwestern Alabama. It provided a living for 1,858 persons in 1975. 26.3% were black. It is significant to note, that if the lowest job classification, service/maintenance, were removed from our consideration, only 10.4% of the employees would be black. Likewise, removing the lowest salary classification, less than $5,900 per year, only 13.8% of all city employees are black. (Plaintiff's Exhibit No. 73).

The Mobile Fire Department has only fifteen black employees out of a total of four hundred and thirty-five employees. It took an order of this court in *Allen v. City of Mobile*, 331 F.Supp. 1134 (S.D.Ala.1971), aff'd. 466 F.2d 122 (5th Cir. 1972), cert. denied 412 U.S. 909, 93 S.Ct. 2292, 36 L.Ed.2d 975 (1973) to desegregrate the Mobile Police Department. That order set out guidelines designed to remove racial discrimination in hiring, promoting, assigning duties, and the rendering of services. The city is also operating under another court order enjoining

[5]See Footnote 1, *supra*.

racial discrimination, *Anderson v. Mobile City Commission*, Civil Action No. 7388-72-H (S.D.Ala.1973). The municipal golf course was desegregated only after litigation in federal court, *Sawyer v. City of Mobile*, 208 F.Supp. 548 (S.D.Ala.1963). This court in *Evans v. Mobile City Lines, Inc.*, Civil Action No. 2193-63 (S.D.Ala.1963), dealt with segregation in public transportation, and in *Cooke v. City of Mobile*, Civil Action No. 2634-63 (S.D.Ala.1963), dealt with segregation at the city airport.

There are 46 city committees with a total membership of approximately 482. Forty-seven are black and 435 are white. The total prior membership is 179 of which only 7 were black. (Plaintiffs' Exhibit No. 64).

The Industrial Development Board has fifteen members and no blacks and concerns itself with implementing a state law known as the "Cater Act" and the authorization of the issuance of municipal bonds for various business enterprises.

Seven committees were organized by private investment groups for the purpose of securing municipal bonding and the black-white makeup of these groups cannot be charged to the city commission. That total membership is 21. Although the membership of these seven committees cannot be charged to the city commissioners, the absence of blacks indicates the permeating results of past racial discrimination in the economic life of Mobile business. This is indicated both from the absence of blacks in the investment groups making use of municipal bonds and in that no black or black financial institutions have been able to take advantage of municipal bonds.

The Board of Adjustment, which consists of seven members, has one black. This is a critical board. It can grant variances from zoning laws and building codes

involving less than two acres. The Codes Advisory Committee consists of 17 members and no blacks. This committee codifies all building regulations for all structures in the city.

The Mobile Housing Board supervises public housing. Public housing is occupied predominantly by blacks. Fifty thousand persons, approximately 25% of Mobile's population, most of whom are black, cannot buy or rent without subsidies in the private sector, or live in substandard housing.[6] There is one black on that board out of a membership of five.

The Educational Board provides plans and means to aid its employees in a continuing education program. It has nine members, none of whom are black. The county school system has approximately 55% white and 45% black population.[7] The black drop-out rate from school is higher than whites, therefore, the continuing education is most important to them.

There are several boards, to wit, Air-Conditioning, Architectural Board, Board of Examining Engineers, and Board of Electrical Examiners, which require special skills. There are 17 members of these boards, all white. National

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[6]All of these are not in public housing. There are approximately 3,376 public housing units in the city with approximately 12,153 occupants.

[7]The school system is countywide under the supervision of the Board of School Commissioners. The school system was desegregated in the case of *Birdie Mae Davis v. Board of School Commissioners*, Civil Action No. 3003-63-H, pending, and is under the continuing supervision of this court. The city commission cannot be charged with any lack of responsiveness in the *Birdie Mae Davis* case. That case illustrates the permeation of racial discrimination in the city which constitutes two-thirds of the country's population.

census figures indicate that there are far less blacks in skilled groups than whites. The court recognizes that qualified persons should be appointed, but black membership becomes *critical* on such committees because it is through these committees that licenses are granted to skilled occupations. The absence of blacks shows an insensitivity to this particularized need.

The city has not taken affirmative action to place blacks on these critical boards.

Most of the other committees are of various social and cultural nature in the city. No effort has been made to bring blacks into the mainstream of the social and cultural life by appointing them in anything more than token numbers. There are only three blacks out of 46 members on the Bicentennial Committee and only three out of 14 on the Independence Day Celebration Committee.

Primarily because of federal funding and prodding, the city's advisory group for the mass transit technical group has three blacks and five whites.

Mobile was originally founded on the west bank of the Mobile River. The land elevation for most of the business and residential area until World War II was from zero to ten feet. There has been a substantial western expansion from the Mobile River and Bay which lies to the east. Elevation in most of these areas ranges from 40 to 50 feet, but in some of the areas it reaches as much as 160 feet.

There are three principal watersheds in the Mobile area. Three Mile Creek, traverses the northern one-third of the city draining west to east. The southern one-third of the city is drained by Dog River running from west to east. The remaining one-third, which consists of old downtown and residential Mobile, drains east to the Mobile River. Mobile has an annual rainfall of 60 or more inches per year. It is

subject to torrential downpours. All areas of Mobile, white and black, are traversed by open drainage ditches. All areas, white and black, are subject to standing water after torrential downpours with water in parts of all areas reaching the depth of one to two feet.

Mobile has a master drainage plan to be implemented over a long period of time. Unfortunately, most of the black residential areas are drained by the Three Mile Creek. The drainage system for Three Mile Creek involves issuing bonds and financing by the city which involves millions of dollars projected over several years. There has not been overt gross discrimination against the blacks in connection with the drainage project. However, almost all temporary relief in critical areas has been in the white areas. Somehow the white areas get relief with little temporary relief given the black areas.

The resurfacing and maintenance of streets in black neighborhoods significantly suffers in comparison with the resurfacing of streets in white neighborhoods. The testimony and an in-person visit of these areas by the court sustains this conclusion.

The U.S. Treasury Department, after a complaint filed by the NAACP, found racial discrimination in the city's resurfacing program. The city was advised by letter this would have to be corrected in order for the city to comply with the anti-discrimination provision of the Revenue Sharing Act. (Plaintiffs' Exhibit No. 111).

The construction of first class roads, curbs, gutters, and underground storm sewers are closely related to the drainage system. If this type of construction is done in areas subject to repeated flooding, it is a waste of money. The court observed that on the southside of Three Mile Creek near the Crichton area, which was formerly white—now

mixed or predominantly black, in the areas near the creek and subject to flooding, the streets were paved with curb and gutters while on the northside, near the black Trinity Gardens area, only two streets have low-cost paving with curbs, gutters, and underground drainage. Most of the streets are unpaved. To put in first class paving in that black area would be unwise financially, but there is a significant difference and sluggishness in the response of the city to critical needs of the blacks compared to that in the white area.

There is the same difference and sluggishness between whites and blacks in making provisional or temporary mitigating improvements pending development of the master drainage plan throughout the city.

The Williamson School, in a predominantly black area, is in a densely populated residential and neighborhood business area. The houses are on lots large enough and far enough from the streets that the placing of sidewalks could be done without great difficulty. Children from low income families frequently walk or ride bicycles to and from school. Sidewalks are critical in such areas. There was a noticeable lack of sidewalks in and near the Williamson School.

The lack of sidewalks in the Plateau area presents a different problem. The streets are narrow and the lots are small. The houses are built very close to the streets. The personal inspection by the court revealed the obvious difficulty in placing sidewalks in that area.

Blacks in Mobile, and their neighborhoods, endure a greater share of infant deaths, major crimes, T.B. deaths, welfare cases, and juvenile delinquency than do whites in their neighborhoods. In *The Neighborhoods of Mobile: Their Physical Characteristics and Needed Improvements (1969)*, the Mobile City Planning Commission in Table Q

of the Appendix, rates the 78 neighborhoods according to social blight. Nine of the 14 most blighted neighborhoods were predominantly black. The causes of this blight are multiple and it would be inaccurate to suggest that a single member district plan or the election of all black officials would correct them. Some of the causes, as the study in Table A indicates, include inadequate drainage, water, streets, sidewalks, and zoning. The city has a large responsibility in these areas. Although the city has not been totally neglectful, and the expense and problems are monumental, there is a singular sluggishness and low priority in meeting these particularized black neighborhood needs when compared with a higher priority of temporary allocation of resources when the white community is involved.

The Park and Recreation Program has generally been administered in an even-handed fashion, but a city projected park development program in the western part of the city over a period of years involving large sums of money indicates an expansion in predominantly white areas without a simultaneous consideration of the black area needs.

The black community has long complained of police brutality. A number of investigations have been made by the FBI but no indictments or evidence has been uncovered to substantiate serious charges of this nature. On March 28, 1976, a black was arrested near the scene of an alleged burglary. On April 8, an attorney for the law firm of the plaintiffs' attorney in this case reported to the Police Commissioner that there had been an alleged attempted or "mock" lynching of the black person arrested. On April 9, a meeting was held between the commission, the black non-partisan voters league, the district attorney's office, the

chief of police, and others concerning this instance.

The blacks claimed the charges were so serious that the arresting officer should be suspended immediately. It is claimed by the plaintiffs that this officer at that time had pending against him a case of alleged police brutality. The City Attorney immediately obtained some statements of the alleged "mock" lynching indicating there was substance in the charges. On April 13, that officer was discharged and seven others were suspended. Five indictments were returned in connection with the alleged "mock" lynching. The court does not deem it appropriate to make further comments concerning the details. Suffice it to say, there was a timid and slow reaction by the city commission to the alleged "mock" lynching.

The Police Department then instituted an investigation on the older pending charges. As a result of the investigation, two officers were discharged and six were suspended, all in connection with charges of police brutality but concerning unrelated incidents occurring prior to the alleged "mock" lynching.

Shortly thereafter there were twenty to thirty alleged cross burnings in Mobile and adjoining Baldwin County. Two of these were reported to have been in the City of Mobile. The lack of reassurance by the city commission to the black citizens and to the concerned white citizens about the alleged "mock" lynching and cross burnings indicates the pervasiveness of the fear of white backlash at the polls and evidences a failure by elected officials to take positive, vigorous, affirmative action in matters which are of such vital concern to the black people. The sad history of lynch mobs, racial discrimination and violence attributed to cross-burners or fellow-travelers, justifiably raises specters and fears of legal and social injustice in the minds and

hearts of black people. White people who are committed to the American ideal of equal justice under the law are also apprehensive. This sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the political fear of a white backlash vote when black citizens' needs are at stake.

THERE IS NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS

There is no clear cut *State* policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole. The lack of State policy therefore must be considered as a neutral factor.

In considering the State policy with specific reference to Mobile, the court finds that the city commission form of government was passed in 1911. That law provided for the election of the city commissioners at-large. This feature has not been changed although there have been some amendments to designate duties for the commissioners as well as to designate numbered places. Beginning in 1819, the year Alabama became a state in the Union, until 1911, the great majority of the time the city operated under a mayor-alderman form of government. The election for the mayor and aldermen was either at-large or from multi-member districts or wards. The manifest policy of the City of Mobile has been to have at-large or multi-member districting.

PAST RACIAL DISCRIMINATION

Prior to the Voting Rights Act of 1965, there was effective discrimination which precluded effective partici-

pation of blacks in the elective system in the State, including Mobile.

One of the primary purposes of the 1901 Constitutional Convention of the State of Alabama was to disenfranchise the blacks. The Convention was singularly successful in this objective. The history of discrimination against blacks' participation, such as the cumulative poll tax, the restrictions and impediments to blacks registering to vote, is well established.

Local discrimination in the city and the county has already been noted in connection with the lawsuits concerning racial discrimination arising in this court, to wit, the *Allen, Anderson, Sawyer, Evans,* and *Cooke, supra,* cases. *Preston v. Mandeville*, 479 F.2d 127 (5th Cir. 1973) was a countywide case involving racial discrimination of Mobile's jury selection practices. *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed.2d 987 (1944) (white primaries) was applicable to Alabama and some Alabama cases of discrimination are *Davis v. Schnell*, 81 F.Supp. 872 (S.D.Ala.1949), aff'd. 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (1949) ("interpretation" tests for voter registration), *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering of local government), *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (racial gerrymandering of state government), and *U.S. v. Alabama*, 252 F.Supp. 95 (M.D.Ala.1966) (Alabama poll tax).

The racial polarization existing in the city elections has been discussed herein. The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing city commissioners.

In the 1950's and early sixties, prior to the Voting Rights Act of 1965, only a relatively small percentage of the blacks were registered to vote in the county and city.[8] Since the 1965 Voting Rights Act, the blacks have been able to register to vote and become candidates.

ENHANCING FACTORS

With reference to the enhancing factors, the court finds as follows:

(1) The citywide election encompasses a large district. Mobile has an area of 142 square miles with a population of 190,026 in 1970.

(2) The city has a majority vote requirement. Alabama Acts 281 (1911) at 343, requires election of commissioners by a majority vote.

(3) There is no anti-single shot voting provision but the candidates run for positions by place or number.[9]

(4) There is a lack of provision for the at-large candidates to run from a particular geographical subdistrict, as well as a lack of residence requirement.

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[8]In the 1950's or 1960's the impediments placed in the registration of blacks to vote was not as aggravated in Mobile County as in some counties. It was not necessary for federal voter registrars to be sent to Mobile to enable blacks to register.

[9]The influence of this enhancing factor is minimal. Voters could scarcely make an intelligent choice for the best person to serve as a commissioner to perform specific duties, such as Department of Finance, without a numbered or place system. It is this writer's opinion, born out of 15 years experience in a State judicial office subject to the electoral process, that the public's best interest is served, and it can make more intelligent choices, when candidates run for numbered positions. The choices between candidates are narrowed for the voter and they can be compared head to head.

The court concludes that in the aggregate, the at-large election structure as it operates in the City of Mobile substantially dilutes the black vote in the City of Mobile.

CONCLUSIONS OF LAW

I

There is a threshold question faced by this court in whether or not *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), is dispositive of this case so as to preclude an application of the factors determinative of voter dilution as set forth in *White, supra*, and *Zimmer, supra*, aff'd. *sub nom. East Carroll Parish School Board, supra.*

It is the defendants' contention that *Washington* makes it clear that to prevail the plaintiffs must prove that the city commission form of government was adopted for Mobile in 1911 with a discriminatory *purpose.* They further contend that since the 1901 Constitution of Alabama effectively disenfranchised the blacks, the at-large system adopted for the city commission in 1911 had no relation to minimizing or diluting the black vote because there was none. The city further contends that the commission form of government was adopted for purposes of executive efficiency and for an abandonment of the then corrupt aldermanic district elections. The plaintiffs contend that *Washington did not establish a new Supreme Court purpose* test.

The thrust of the defendants' argument is that if the 1911 statute creating the at-large city commission form of government election was neutral on its face *Washington does not* permit this court to consider other evidence or

factors and must decide the case in the city's favor. It is argued that *Washington* is a benchmark decision requiring this finding in the multi-member at-large city elections.

Washington upheld the validity of a written personnel test administered to prospective recruits by the District of Columbia Police Department. It had been alleged the test "excluded a disproportionately high number of Negro applicants." *Id.*, 426 U.S. at 233, 96 S.Ct. at 2044. The petitioners claimed the effect of this disproportionate exclusion violated their Fifth Amendment due process rights and 42 U.S.C. §1981. *Id.*, 96 S.Ct. at 2044. Evidence indicated that four times as many blacks failed to pass the test as whites. Plaintiffs contended the impact in and of itself was sufficient to justify relief. They made no claim of an intent to discriminate. The District Court found no intentional conduct and refused relief. The Circuit Court reversed, relying upon *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). *Griggs* was a Title VII action (42 U.S.C. §2000e, *et seq.*) in which the racially discriminatory impact of employment tests resulted in their invalidation by the court.

The Supreme Court in *Washington* reconciled its decision with several previous holdings, distinguished some, and expressly overruled some cases in which there were possible conclusions different from *Washington.*

They made *no reference to the recent pre-Washington* cases of its or appellate courts' voting dilution decisions dealing with at-large or multi-member versus single member districts, and, in particular, no mention was made of the cardinal case in this area, *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2342, 37 L.Ed.2d 314 (1973), nor to *Dallas v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975), and *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751,

42 L.Ed.2d 766 (1975), nor to *Zimmer*, which the Court had affirmed only a few months before, nor to *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1975). No reference was made to *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), to *Reynolds*, nor to *Whitcomb. Whitcomb*, 403 U.S. at 143, 91 S.Ct. 1858, 29 L.Ed.2d 363, recognized that in an at-large election scheme, a showing that if in a particular case the system operates to minimize or cancel out the voting strength of racial or political elements, the courts can alter the structure. Had the Supreme Court intended the *Washington* case to have the far reaching consequences contended by defendants, it seems to this court reasonable to conclude that they would have made such an expression.

There are several reasons which may be plausibly advanced as to why the *Washington* Court did not expressly overrule nor discuss these cases. Courts are not prone to attempt to decide every eventuality of a case being decided or its effect on all previous cases. The Court may have desired that there be further development of the case law in the district and circuit courts before commenting on the application of *Washington* to this line of cases. The cases may be distinguishable and reconcilable with the expressions in *Washington.* Or, it may not have been the intention of the *Washington* Court to include these cases within the ambit of its ruling.

Washington spoke with approval of *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), setting out the "intent to gerrymander" requirement established in *Wright. Washington*, 426 U.S. at 240, 65 S.Ct. at 2047-48.

Wright was the direct descendant of *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110

(1960). These two cases involved racial gerrymandering of political lines. *Gomillion* dealt with an attempt by the Alabama legislature to exclude most black voters from the municipal limits of Tuskegee so whites could control the elections. The Court found that the State of Alabama impaired the voting rights of black citizens while cloaking it in the garb of the realignment of political subdivisions and held there was a violation of the Fifteenth Amendment. *Gomillion, supra*, 364 U.S. at 345, 81 S.Ct. 125. There was no direct proof of racial discriminatory intent. Justice Stevens in his concurring opinion noted with approval, "... when the disproportion[ate impact] is as dramatic as in *Gomillion*, ..., it really does not matter whether the standard is phrased in terms of *purpose* or *effect.*" *Washington, supra*, 426 U.S. at 254, 96 S.Ct. at 2054.[10] (emphasis added).

Wright dealt with the issue of congressional redistricting of Manhattan. The plaintiffs alleged racially motivated districting. The congressional lines drawn created four districts. One had a large majority of blacks and Puerto Ricans. The other three had large white majorities. The court held the districts were not unconstitutionally gerrymandered upon the finding that "... the New York legislature was [not] motivated by racial considerations or

[10]In *Paige v. Gray*, 538 F.2d 1108 (5th Cir. 1976), black citizens of Albany, Georgia, brought an action to invalidate the at-large system of electing city commissioners. At 1110 n.3, the court noted the above quote by Justice Stevens, but in the body of the opinion expressed concern with unlawful motive for discriminatory purpose as required by *Washington.* However, at 1110, the court stated "the validity of Albany's change from a ward to an at-large system can best be handled by applying the multifactor test enunciated in ... *White v. Regester* ... and *Zimmer v. McKeithen.*" *Paige*, at 1111, stated *Zimmer* still "sets the basic standard in this circuit."

in fact drew the districts on racial lines." *Wright*, 376 U.S. at 56, 84 S.Ct. at 605. This set forth the principle that in gerrymandering cases in order for the plaintiffs to obtain relief they must show racial motivation in the drawing of the district lines.

Washington then quoted with approval from *Keyes v. School District No. I*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), indicating a distinction or reconciliation of that case with *Washington*. There had not been racial purpose or motivation *ab initio* in *Keyes*. *Keyes* was a Denver, Colorado, school desegregation case. Denver schools had never been segregated by force of state statute or city ordinance. Nevertheless, the majority found that the *actions* of the School Board during the 1960's were sufficiently indicative of "... [a] *purpose* or *intent* to segregate" and a finding of *de jure* segregation was sustained. *Keyes*, 413 U.S. at 205, 208, 93 S.Ct. 2686, 2697. The Court held that to find overt racial considerations in the *actions* of government officials is indeed a difficult task.[11]

Washington further commented:

> "... an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington, supra*, 426 U.S. at 242, 96 S.Ct. at 2049.

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[11]In another Fifth Circuit case it was held that if an official is motivated by such wrongful intent, he or she

> "... will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct ... play no small part'." *U.S. v. Texas Ed. Agency*, 532 F.2d 380, 388 (5th Cir. 1976) (Austin II) (school desegregation).

The plaintiffs contend that *Washington's* discussion with approval of the *Keyes* case permits the application of the "tort" standard in proving intent. In his concurring opinion, Justice Stevens discussed this point:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For *normally the actor is presumed to have intended the natural consequences of his deeds.* This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation." *Washington, supra*, 426 U.S. at 253, 96 S.Ct. at 2054 (emphasis added).

The plaintiffs contend this circuit's use of the tort standard of proving intent squares with the above statements. This circuit for several years has accepted and approved the tort standard as proof of segregatory intent as a part of state action in school desegregation findings. *Morales v. Shannon*, 516 F.2d 411, 412-13 (5th Cir. 1975), *cert. den.* 423 U.S. 1034, 96 S.Ct. 566, 46 L.Ed.2d 408 (1975).

Recently, citing *Morales, supra, Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. den.* 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041 (1973), *reh. den.* 414 U.S. 881, 94 S.Ct. 3015, 38 L.Ed.2d 1249 (1973), and *United States v. Texas Educational Agency*, 467 F.2d 848 (5th Cir. 1972) (en banc) (Austin I), the Fifth Circuit in *U.S. v. Texas Education Agency* (Austin Independent School District) 532 F.2d 380 (5th Cir. 1976) (Austin II) squarely addressed the meaning of discriminatory intent in the following language:

"Whatever may have been the originally intended meaning of the tests we applied in *Cisneros* and *Austin I* [*U.S. v. Texas Education Agency, supra*], we agree with the intervenors that, after *Keyes*, our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions.

* * *

Apart from the need to conform *Cisneros* and *Austin I* to the supervening *Keyes* case, there are other reasons for attributing responsibility to a state official who should reasonably foresee the segregative effects of his actions. First, it is difficult—and often futile—to obtain direct evidence of the official's intentions . . . Hence, courts usually rely on circumstantial evidence to ascertain the decision-makers' motivations." *Id.* at 388.

This court in its findings of fact has held that when the 1911 statute was enacted, at a time the blacks were disenfranchised, the statute on its face was neutral. This is in line with Fifth Circuit opinions, *McGill v. Gadsden Co. Commission*, 535 F.2d 277 (5th Cir. 1976), *Wallace v. House*, 515 F.2d at 633 (5th Cir. 1975), vacated 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (5th Cir. 1976), affirmed the District Court and *Taylor v. McKeithen*, 499 F.2d 893, 896 (5th Cir. 1974). However, in the larger context, the evidence is clear that one of the primary purposes of the 1901 constitutional convention was to disenfranchise the blacks.[12]

[12]The history of Alabama indicates that there was a populist movement at that time which sought to align the blacks and poor whites. The Bourbon interests of the State sought to disenfranchise the poor whites along with the blacks but were unsuccessful, excepting the cumulative feature of the poll tax. They were singularly successful in disenfranchising the blacks.

Therefore, the legislature in 1911 was acting in a race-proof situation. There can be little doubt as to what the legislature would have done to prevent the blacks from effectively participating in the political process had not the effects of the 1901 constitution prevailed. The 1901 constitution and the subsequent statutory schemes and practices throughout Alabama, until the Voting Rights Act of 1965, effectively disenfranchised most blacks.

A legislature in 1911, less than 50 years after a bitter and bloody civil war which resulted in the emancipation of the black slaves, should have reasonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large system imposed in 1911.

Under Alabama law, the legislature is responsible for passing acts modifying the form of city and county governments. Mobile County elects or has an effective electoral voice in the election of eleven members of the House and three senators. The state legislature observes a courtesy rule, that is, if the county delegation unanimously endorses local legislation the legislature perfunctorily approves all local county legislation. The Mobile County Senate delegation of three members operates under a courtesy rule that any one member can veto any local legislation. If the Senate delegation unanimously approves the legislation, it will be perfunctorily passed in the State Senate. The county House delegation does not operate on a unanimous rule as in the Senate, but on a majority vote principle, that is, if the majority of the House delegation favors local legislation, it will be placed on the House calendar but will be subject to debate. However, the proposed county legislation will be

perfunctorily approved if the Mobile County House delegation unanimously approves it. The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a federal court order.[13] There are now three blacks on the eleven member House legislative delegation. This resulted in passage in the 1975 legislature of a bill doing away with the at-large election of the County Board of School Commissioners and creating five single member districts. This was promptly attacked by the all-white at-large elected County School Board Commission in the State court. The act was declared unconstitutional for failure to have met constitutional requirements concerning advertisement.

This natural and foreseeable consequence of the 1911 Act, black voter dilution, was brought to fruition in 50 odd years, the middle 1960's, and continues to the present. This court sees no reason to distinguish a school desegregation case from a voter discrimination case. It appears to this court that the evidence supports the tort standard as advocated by the plaintiffs. However, this court prefers not to base its decision on this theory. This court deems it desirable to determine if the far-reaching consequence of *Washington* as advanced by the defendants is correct without regard to *Keyes*. This court is unable to accept such a broad holding with such far-reaching consequences.

The case *sub judice* can be reconciled with *Washington*. The *Washington* Court, in Justice White's majority

[13]*Sims v. Amos*, 336 F.Supp. 924 (M.D.Ala. 1972).

opinion, included the following:

> "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.220 (1886)." *Washington, supra*, 426 U.S. at 241, 96 S.Ct. at 2048.

To hold that the 1911 facially neutral statute would defeat rectifying the invidious discrimination on the basis of race which the evidence has shown in this case would fly in the face of this principle.

It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an "unequal application of the law ... as to show intentional discrimination," *Akins v. Texas*, 325 U.S. 398, 404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945), and the deliberate systematic denials to people from juries because of their race, *Carter v. Jury Commission*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950), *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947), cited in *Washington, supra*, 426 U.S. at 239-40, 96 S.Ct. at 2047, to a present purpose to dilute the black vote as evidenced in this case. There is a "current" condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes. Washington, supra*, 426 U.S. at 240, 96 S.Ct. at 2048.

More basic and fundamental than any of the above approaches is the factual context of *Washington* and this case. Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination. *Washington's* failure to expressly overrule or comment on *White, Dallas, Chapman, Zimmer, Turner, Fortson, Reynolds,* or *Whitcomb*, leads this court to the conclusion that *Washington* did not overrule those cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination.

II

In order for this court to grant relief as prayed for by plaintiffs, it must be shown that the political process was not open equally to the plaintiffs as a result of dilution of voting strength and consequently the members of the class had less opportunity to participate in the political process and elect representatives of their choice. *Chapman*, 420 U.S. at 18, 95 S.Ct. 751, and *Whitcomb.* "Access to the political process and not [the size of the minority] population" is the key determinant in ascertaining whether there has been invidious discrimination so as to afford relief. *White*, 412 U.S. at 766, 93 S.Ct. 2332; *Zimmer*, 485 F.2d at 1303.

The idea of a democratic society has since the establishment of this country been only a supposition to many citizens. The Supreme Court vocalized this realization in *Reynolds* where it formulated the "one person-one vote" goal for political elections. The precepts set forth in *Reynolds* are the substructure for the present voter dilution

cases, stating that "every citizen has an inalienable right to full and effective participation in the political processes . . ." *Reynolds*, 377 U.S. at 565, 84 S.Ct. at 1383. The Judiciary in subsequent cases has recognized that this principle is violated when a particular identifiable racial group is *not* able to fully and effectively participate in the political process because of the system's structure.

Denial of full voting rights range from outright refusal to allow registration, *Smith v. Allwright, supra*, to racial gerrymandering so as to exclude persons from voting in a particular jurisdiction, *Gomillion v. Lightfoot, supra*, to establishing or maintaining a political system that grants citizens all procedural rights while neutralizing their political strength, *White v. Regester, supra.* The last arrangement is maintained by the City of Mobile.

Essentially, dilution cases revolve around the "quality" of representation. *Whitcomb*, 403 U.S. at 142, 91 S.Ct. 1858. The touchstone for a showing of unconstitutional racial voter dilution is the test enunciated by the Supreme Court in *White,* 412 U.S. at 765, 93 S.Ct. at 2339; Whether "multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups." In *White*, for slightly different reasons in each county, the Supreme Court found that the multi-member districts in Dallas and Bexar Counties, Texas, were minimizing black and Mexican-American voting strength.

Attentive consideration of the evidence presented at the trial leads this court to conclude that the present commission form of government in the City of Mobile impermissibly violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process. *White*, 412 U.S. at 766, 93 S.Ct. 2332; *Whitcomb*, 403 U.S. at 143, 91 S.Ct. 1858. The plaintiffs

have discharged the burden of proof as required by *Whitcomb.*

This court reaches its conclusion by collating the evidence produced and the law propounded by the federal appellate courts. The controlling law of this Circuit was enunciated by Judge Gewin in *Zimmer*, which closely parallels *Whitcomb* and *White.*[14] The *Zimmer* court, in an *en banc* hearing, set forth four primary and several "enhancing" factors to be considered when resolving whether there has been impermissible voter dilution. The primary factors are:

> "... a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case [for relief] is made." *Zimmer* at 1305. (footnotes omitted).

The enhancing factors include:

> "a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Ibid.* (footnotes omitted).

1. LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS

First, the political parties in the City of Mobile do not

[14]See also *Paige v. Gray*, 538 F.2d 1108 (5th Cir. 1976).

slate candidates per se; rather, any person interested in running for the position of city commissioner is able to do so. There has been little evidence to a "party" supporting one candidate or another in the city races.

The system at first blush appears to be neutral, but consideration of facts beneath the surface demonstrate the *effects* which lead the court to conclude otherwise. No black has ever been elected city commissioner in Mobile. The evidence indicates that black politicians who have previously been candidates in at-large elections and would run again in the smaller single member districts, shy away from city at-large elections. One of the principal reasons is the polarization of the white and black vote. The court is concerned with the effect of lack of openness in the electoral system in determining whether the multi-member at-large election system of the city commissioners is invidiously discriminatory.

In *White*, the Supreme Court expressed concern with any type of barrier to effective participation in the political process. *Zimmer*, 485 F.2d at 1305 n.20, expressed its view in this language: "the standards we enunciate today are applicable whether it is a specific law or a custom or practice which causes diminution of a minority voting strength."

There is a lack of openness to blacks in the political process in city elections.

2. UNRESPONSIVENESS OF THE ELECTED CITY OFFICIALS TO THE BLACK MINORITY

It is the conclusion of the court that the city-wide elected municipal commission form of government as practiced in

the City of Mobile has not and is not responsive to blacks on an equal basis with whites; hence there exists racial discrimination. Past administrations not only acquiesced to segregated folkways, but actively enforced it by the passage of numerous city ordinances. There have been orders from this court to desegregate the police department, the golf course, public transportation, the airport, and which attack racial discrimination in employment.[15]

There has been a lack of responsiveness in employment and the use of public facilities. It is this court's opinion that leadership should be furnished in non-discriminatory hiring and promotion by our government, be it local, state, or federal.[16]

In addition to the refusal of officials to voluntarily desegregate facilities, the city commissioners have failed to

[15]The County School Board, which operates both in the city and county, has been in federal court continuously since 1963 to effect meaningful desegregation. *Davis v. Mobile County School Board*, Civil Action No. 3003-63 (S.D.Ala.1963). Incidentally, during the course of the court's continuing jurisdiction in *Davis*, there have been fifteen or more appeals to the Fifth Circuit.

[16]*Norman R. McLaughlin, etc. v. Howard H. Callaway, et al.*, 382 F.Supp. 885, 895 (S.D.Ala.1974) stated:

> "It is only fitting that the government take the lead in the battle against discrimination by ferreting out and bringing an end to racial discrimination in its own ranks."

Mobile has no ordinances proclaiming equal employment opportunity, either public or private, to be its policy. There are no non-discriminatory rental ordinances. On the one hand, the federal courts are often subjected to arguments by recalcitrant state and local officials of the encroachment of the federal bureaucracy and assert Tenth Amendment violations—while making no mention that were it not for such "encroachment" citizens would not have made the progress they have to fulfillment of equal rights. Recent history bears witness to this proposition.

appoint blacks to municipal committees in numbers even approaching fair representation. Appointments to city committees are important not only to obtain diverse opinions from all parts of the community and share fairly what power the committees have, but for the black community it would open parts of the governmental processes to those to whom they have for so long been denied. The city commission's custom or policy of appointing disproportionately few blacks to committees is a clear reflection of the at-large election system's dilution of blacks' influence and participation. The commissioners appoint citizens from their neighborhoods and constituencies, which are virtually all white. The commissioners have relatively less contact with the black community and hence are not as likely to know of black citizens who are qualified and interested in serving on committees. Recognizing the admonitions of the courts when judicially dealing with discretionary appointments, *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974), and *James v. Wallace*, 533 F.2d 963 (5th Cir. 1976), that it is not within the authority of this court to order particular appointments, it is this court's view that the failure to appoint a significant number of blacks is indicative of a lack of responsiveness.

3. NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS

The Alabama legislature has offered little evidence of a preference one way or the other for multi-member or at-large districts in cities the size of Mobile. For example, Title 37, §426, *Code of Alabama* (Supp. 1973), provides

for a number of various forms of either multi-member or single-member municipal governments, with a municipality's option often dictated by its size. Mobile, with a population exceeding 50,000 persons, is allowed by Title 37, §426, to have a mixture of single-member and at-large aldermen. Consequently, this court finds state policy regarding multi-member at-large districting as neutral.

Mobile itself has had a mixed history concerning its local preference for representative districting, particularly prior to the adoption of the commission government in 1911. Elections were usually at-large but at times there were some ward residency requirements and multi-member ward elections. Since 1911, however, the city commission has been elected in citywide at-large elections.

4. PAST RACIAL DISCRIMINATION

It is this court's opinion that fair and effective participation under the present electoral system is, because of its structure, difficult for the black citizens of Mobile. Past discriminatory customs and laws that were enacted for the sole and intentional purpose of extinguishing or minimizing black political power is responsible. The purposeful excesses of the past are still in evidence today. Indeed, Judge Rives, writing for a three-judge finding the Alabama poll tax to be unconstitutional, stated forcefully:

> " 'The long history of the Negroes' struggle to obtain the right to vote in Alabama has been trumpeted before the Federal Courts of this State in great detail. * * If this Court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf.' We would be blind with indifference, not impartiality, and deaf with intentional disregard of the cries for equality of men before the law." *U.S. v. State of Alabama*, 252 F.Supp. at 104 (M.D.Ala.1966) [citing *Sims v. Baggett*, 247 F.Supp. 96, 108-09 (M.D.Ala.1965)].

Without question, past discrimination, some of which continues to today as evidenced by the orders in several lawsuits in this court against the city and county, and demonstrated in the lack of access to the selection process and the city's unresponsiveness, contributes to black voter dilution.

5. ENHANCING FACTORS

Zimmer, in addition to enumerating four substantial criteria in proving voter dilution, listed four "enhancing factors" that should be considered as proof of aggravated dilution.

a. *Large Districts.* The present at-large election system is as large as possible, i.e., the city. The city with an area of 142 square miles, and more than 190,000 persons, can reasonably be divided into election districts or wards. It is common knowledge that numerous towns and cities of much less size in Alabama are so divided and function reasonably well. It is large enough to be considered large within the meaning of this factor.

b. *Majority Vote Requirements.* Alabama Acts No. 281 (1911) at 343, which established the Mobile commission form of government, required the election of the representatives by a majority vote.

c. *Anti-single Shot Voting.* There is in Act No. 281 "no anti-single shot" voting provisions nor is there one in the current codification, [Ala.Code, Title 37, §89, *et seq.*] or in

Alabama Acts No. 823 (1965) at 1539.[17]

The numbered place provision of Act 823 (or, if Act 823 is invalid, Ala.Code, Title 37, §94) has to some extent the same result. At least in part, the practical result of an anti-single shot provision obtains in Mobile.[18]

d. *Lack of Residency Requirement.* Act 281 does not contain any provision requiring that any commissioners reside in any portion of town.[19]

III

The court has made a finding for each of the *Zimmer* factors, and most of them have been found in favor of the plaintiffs. The court has analyzed each factor separately, but has not counted the number present or absent in a "score-keeping" fashion.

The court has made a thoughtful, exhaustive analysis of the evidence in the record ". . . [paying] close attention to the facts of the particular situations at hand," *Wallace*, 515 F.2d at 631, to determine whether the minority has suffered

[17]An "anti-single shot" provision obtained in all city elections from 1951 to 1961, see Ala. Code, Title 37, §33(1), but was repealed 9/15/61.

[18]See footnote 9, supra.

[19]To impose residency requirements under Act 823, the designation of duty provision (or if Act 823 is invalid, Ala.Code, Title 37, §94, the numbered position provision), as well as the 1911 establishment of at-large electior. of city commissioners would at a minimum be anomalous and probably unconstitutional. City commissioners in command of particular functions, such as public safety, residing and being elected from one particular side of town, would be accountable to only one-third of the population notwithstanding jurisdiction over the entire city. *B.U.L.L. v. City of Shreveport*, 71 F.R.D. 623 (W.D.La.1976), also expresses this view.

an unconstitutional dilution of the vote. This court's task is not to tally the presence or absence of the particular factors, but rather, its opinion represents ". . . a blend of history and an intensely local appraisal of the design and impact of the . . . multi-member district [under scrutiny] in light of past and present reality, political and otherwise." *White*, 412 U.S. at 769-70, 93 S.Ct. at 2341.

The court reaches its conclusion by following the teachings of *White, Dallas v. Reese*, 421 U.S. 477, 480, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975), *Zimmer, Fortson*, and *Whitcomb, et al.*

The evidence when considered under these teachings convinces this court that the at-large districts "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb*, 403 U.S. at 143, 91 S.Ct. at 1869, and *Fortson*, 379 U.S. at 439, 85 S.Ct. 498, and "operates impermissibly to dilute the voting strength of an identifiable element of the voting population,". *Dallas*, at 480, 95 S.Ct. at 1708. The plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors cataloged in *Zimmer*.

In summary, this court finds that the electoral structure, the multi-member at-large election of Mobile City Commissioners, results in an unconstitutional dilution of black voting strength. It is "fundamentally unfair", *Wallace*, 515 F.2d at 630, and invidiously discriminatory.

The Supreme Court has laid down the general principle that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor v. Johnson*, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971). The Court reaffirmed this twice in the

last term. *East Carroll Parish School Board*, and *Wallace, supra.* Once the racial discriminatory evil has been established, as it was in *White*, the dilution occasioned by the multi-member at-large election requires the disestablishment of the multi-member at-large election and the obvious remedy is to establish single member districts.

This court does not endorse the idea of quota voting or elections, nor of a weighted vote in favor of one race to offset racial prejudice or any other adversity. However, when the electoral structure of the government is such, as in this case, that racial discrimination precludes a black voter from an effective participation in the election system, a dilution of his and other black votes has occurred.

The moving spirit present at the conception of this nation, "all men are created equal," will not rest and the great purpose of the Constitution to "establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity . . . ." will be only a dream until every person has an opportunity to be equal. To have this opportunity, every person must be treated equally. This includes being treated equally in the electoral process.

A city government plan which includes small single-member districts will provide blacks a realistic opportunity to elect blacks to the city governing body. No such realistic opportunity exists as the city government is presently structured. A mayor-council plan with single-member council districts, would afford such an opportunity. Blacks effective participation in the elective system will have the salutary effect of giving them a realistic opportunity to get into the mainstream of Mobile's life, not only in the political life, but will give them an opportunity to have an input and impact on the economic, social, and cultural life of the city. It will afford an opportunity for a more meaningful dialogue between the whites and blacks to develop.

IV

There is a traditional constitutional tolerance of various forms of local government. See, e.g., *Abate v. Mundt*, 403 U.S. 182, 185, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971).

The court recognizes the "delicate issues of federal-state relations underlying this case." *Mayor of the City of Philadelphia, supra*, 415 U.S. at 615, 94 S.Ct. at 1331.

The futility of piecemeal efforts to correct racially discriminatory problems here has been demonstrated in *Davis v. Board of School Commissioners*, as well as the suits previously filed against the city. The city commission form of government is newer and less widely used than the mayor-councilman (or alderman) form. Mobile operated under a mayor-councilman (in Mobile history sometimes called commissioner, mayor-alderman, etc.) plan from the time Alabama entered the Union in 1819 until 1911. Most of the other municipalities in the county and state operate under such a plan. The change is not from the known to the unknown or from the old to the new. The court is unable to see how the impermissibly unconstitutional dilution can be effectively corrected by any other approach.

The defendants have argued the governing body needs a citywide perspective, and quoted 87 Harv.L.Rev. 1851, 1857 (1974). "The districtwide perspective and allegiance which result from representatives being elected at-large, and which enhance their ability to deal with districtwide problems, would seem more useful in a public body with responsibility only for the district than in a statewide legislature."

In a mayor-councilman plan, the mayor, the principal governing official, will be elected at-large and will have this citywide perspective, but the governing body will have the

benefit of members from single member districts.[20]

[20]*Dove, et al. v. Moore, et al.*, 539 F.2d 1152 (8th Cir. 1976), set out at n.3;

"The author has previously discussed at length the undesirable characteristics of at-large elections and the benefits of single-member districts. *Chapman v. Meier*, 372 F.Supp. 371, 388-94 (D.N.D.1974) (three-judge court) (Bright, J., dissenting), *majority reversed*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). In the context of a discussion of proposed plans for the reapportionment of a state legislature, the dissent emphasized the following benefits of single-member districts:

(1) It gives a voter a chance to compare only two candidates, head to head in making a choice.
(2) It prevents one political party with a heavy plurality in one or two potential districts from dominating other potential districts that might narrowly go for the candidate of the opposite party.
(3) It prevents a city wide political organization from ostracizing or disciplining a legislator, who dare stray from the machine's line.
(4) It permits a citizen to identify a legislator as his senator and makes direct communication easier.
(5) It makes each senator responsible for his actions and makes it difficult for a senator to fade into the ranks of "the team" to avoid being identified with specific actions taken.
(6) It reduces campaign costs and "personalizes" a campaign.
(7) It creates greater interest in the possibility of a citizen seeking a legislative seat without the political machine blessing.
(8) It would diminish the animosity created in the legislature against multi-senate districts because of the tendency of senators elected by one political party from a city to vote as a bloc.
(9) It would tend to guarantee an individual point of view if all senators are not elected as a team.
(10) It would equalize the power of people in single senate districts with the people in the broken down multi-senate districts to *influence* the *election* of *only one* senator.
[372 F.Supp. at 391 (footnote omitted) (emphasis in original).]"

It is the court's conclusion that a mayor-councilman (alderman) form of government should be drafted. The court requested, and received from the plaintiffs and defendants, the recommendation of three persons from which the court would choose a three-person committee to draft and recommend to the court such a form of government.[21]

The next question is choice of council size and apportionment. The court could revert to the plan which was in effect when Mobile adopted the commission plan, or it could utilize Alabama Code Title 37, Sec. 426 (1940 Supp. 1973).

The pre-1911 plan consisted of a fifteen member council with seven elected at-large and eight from single-member districts. To have this many of the council elected from at-large will tend to perpetuate the multi-member districting which the court has found unconstitutional.

The present provisions of Sec. 426 allow Mobile to adopt one of several type plans. The overwhelming evidence in the case established that the type of plan provided is what is commonly known as "weak mayor-council" type plan and is undesirable. There are also problems with three of the four plans which provide for at-large elections, the evil the court has found to exist in the present form of the city government.

The court requested the plaintiffs and defendants to draft and present to the court proposed single-member districts for councilmen under a mayor-council plan. The plaintiffs presented to the court a nine single-member district plan. The defendants chose not to avail themselves of this

[21]The court has appointed this committee and has given them a target date of December 1, 1976, to make their recommendations.

opportunity. A nine member plan has previously been adopted in part in two of Alabama's largest cities, Birmingham and Montgomery.

The next city election is scheduled for August, 1977. The court finds it would not be in the public interest to shorten the terms of present commissioners.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in the August, 1977 municipal election, a mayor elected at-large and nine council members elected from nine single-member districts.

The plaintiffs' claims for attorneys' fees and costs will be determined after a hearing on these issues.

The court recognizes that the ordering of the change of the city form of government has raised serious constitutional issues. Reasonable persons can reasonably differ. The only remaining duties to be performed in this court are the approval of the mayor-councilman plan with relation to their duties, its implementation, and the approval of a nine single-member district plan. It is the court's judgment that this decree this date is a final judgment and decree from which an appeal may be taken. However, in the event it is not a final decree, the court *ex mero motu* pursuant to 28 U.S.C. §1292(b) finds that the order herein entered involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation and grants the right to either party to take an immediate appeal.

It is the court's desire that if this order is appealed, such an appeal be taken promptly in order to provide the appellate courts with an opportunity to review, and, if possible, render a ruling prior to the campaign and election for the city government offices as scheduled for August, 1977.

Pending further orders, the court retains jurisdiction of this action to secure compliance with its decree issued contemporaneously herewith and for such other and further relief as may be equitable and just.

APPENDIX C

[caption omited in printing]

JUDGMENT

The court has heretofore entered its findings of fact and conclusions of law in favor of the plaintiffs and against the defendants, Gary A. Greenough, Robert B. Doyle, Jr., and Lambert C. Mims, individually and in their official capacities as Mobile City Commissioners.

The court has found that the electoral structure, the multi-member at-large election of Mobile City Commissioners, results in an constitutional dilution of the black plaintiffs' voting strength. It is fundamentally unfair and invidiously discriminatory. The court has found that it is not feasible to elect city commissioners who exercise certain specific duties, to wit, one, Public Works and Services, another, Public Safety, and a third, the Department of Finance, from districts representing one-third or portions of the total population. The court has found that a mayor-council plan with nine single-member council districts would correct the unconstitutional dilution of the black plaintiffs' vote. The court has ordered a committee of three, selected from recommendations of three persons submitted by the plaintiffs and three persons by the defendants, to draft a "strong" mayor-councilman form of government with the mayor to be chosen at-large and the councilmen to be chosen from nine single-member districts. The court has under consideration proposed nine single-member districts and will order such a plan adopted later.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in the August, 1977 municipal election, a mayor elected at-large and nine

council members elected from nine single-member districts.

The plaintiffs' claims for attorneys' fees and costs will be determined after a hearing on these issues.

The court recognizes that the ordering of the change of the city form of government has raised serious constitutional issues. Reasonable persons can reasonably differ. The only remaining duties to be performed in this court are the approval of the mayor-councilman plan with relation to their duties, its implementation, and the approval of a nine single-member district plan. It is the court's judgment that this decree this date is a final judgment and decree from which an appeal may be taken. However, in the event it is not a final decree, the court *ex mero motu* pursuant to Title 28 U.S.C. §1292(b) finds that the order herein entered involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation and grants the right to either party to take an immediate appeal.

It is the court's desire that if this order is appealed, such an appeal be taken promptly in order to provide the appellate courts with an opportunity to review, and, if possible, render a ruling prior to the campaign and election for the city government offices as scheduled for August, 1977.

Pending further orders, the court retains jurisdiction of this action to secure compliance with its order issued contemporaneously with this decree and for such other and further relief as may be equitable and just.

Done, this the 22nd day of October, 1976.

/s/ Virgil Pittman

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
22nd DAY OF OCTOBER, 1976
MINUTE ENTRY NO. 42080
WILLIAM J. O'CONNOR, CLERK
BY _____
Deputy Clerk

APPENDIX B

[caption omitted in printing]

ORDER

On the 21st day of October, 1976, this court entered an order in this cause. The order decreed that a mayor-council plan of government would be adopted by this court with nine single-member council districts.

The court requested and received from the plaintiffs and defendants, three names recommended by each from whom the court selected a committee to formulate and recommend a mayor-council plan. The court selected two names recommended by the defendants, City of Mobile, et al.; Joseph N. Langan and Arthur R. Outlaw, two former city commissioners of the City of Mobile, and one recommended by the plaintiffs, James E. Buskey, a black State Legislator.

The court requested the plaintiffs and defendants to submit proposed councilmen districts made up of nine single-member districts. The plaintiffs complied. The defendants declined to file a plan.

The committee appointed by the court to draft a mayor-council plan submitted an initial plan. The court submitted the plan to all of the parties for their recommendations and invited all members of the Mobile County legislative delegation to make recommendations. The attorneys for the plaintiffs, and one member of the Mobile County delegation, accepted the invitation and made recommendations, many of which have been incorporated in the final plan. The defendants declined to make any recommendations. Most of the other members of the Mobile legislative delegation expressed a general view that it created a conflict between

their legislative duties and the judicial branch and did not desire to make recommendations.[1]

It is hereby ORDERED, ADJUDGED, and DECREED that the mayor-council plan attached to this order as Appendix A, is hereby ADOPTED and made a part of this order the same as if set out at length herein.

It is further ORDERED, ADJUDGED, and DECREED that the nine single-member council districts as submitted by the plaintiffs' Plan "H", together with the map attached to the plan as Exhibit "A", both of which are attached to this order as Appendix B, is hereby ADOPTED and made a part of this order the same as if set out at length herein.

Beginning at the regularly scheduled city elections in August 1977, and each four years thereafter, the City of Mobile shall elect nine members to a city council and a mayor. The mayor and the city council shall have such powers, duties and responsibilities as are established by the report of the committee appointed by this court on October 6, 1976, attached hereto as Appendix A, and as are established by the provisions of *Ala. Code*, Tit. 37, dealing with cities generally or cities having a mayor-alderman form of government. To the extent that the report or this order conflicts with the *Alabama Code*, the report or order shall prevail.

One member of the City Council shall be elected by and from each district. A candidate for the council and each member of the council shall reside in the district represented or sought to be represented.

Nothing in this order shall prevent the defendants or Legislature of Alabama from changing the powers, duties, responsibilities, or terms of office of the city council and

[1]Some declined because the City of Mobile was not in their district.

mayor, or changing the boundaries of wards or districts, or changing the number of wards; provided however that the court retains jurisdiction for six years from the date of this order to review such changes for comformity with the principles enunciated in the order of this court entered in this case on October 21, 1976.

The court is aware that numerous local acts having application to the City of Mobile are in effect. Because of the change from a commission form to a city council form, there may be conflicts between the plan herein adopted and those acts. The court specifically retains jurisdiction for a period of two years from the date the first city council members take office for all purposes for persons having standing.

The retained jurisdiction of this court under the two preceding paragraphs shall be dissolved upon motion of either party when and if the Legislature of Alabama adopts (a) a comprehensive act establishing a constitutional form of government for the City of Mobile, or (b) enables the City of Mobile to act under "home rule" powers to adopt such a comprehensive act.

The defendants City of Mobile, Gary A. Greenough, Lambert C. Mims, Robert B. Doyle, Jr., and their agents, servants, employees, and successors are hereby ENJOINED from failing to make the following changes with respect to the election of the elected officials of the City of Mobile:

1. Ward 33-99-1 is hereby split into east and west wards, divided by a line beginning at the south boundary of the ward on Stanton, running north to Costarides, west to Summerville, north to Andrews, and east to the ward boundary. The voters in these two areas may be constituted as separate wards or the eastern area may be reassigned as

part of MW-33-99-2.

2. Ward 35-103-1 is split into eastern and western divisions by a dividing line beginning at the west boundary of the ward, running east on Davis Avenue, south on Kennedy to the ward line. The two divisions shall be constituted as separate wards.

3. Ward 35-103-3 is split into northern and southern divisions by a line beginning in the northward boundary on Broad Street, running south to Elmira, east to Dearborn Street, south to New Jersey, east to Warren Street, north to Delaware, east to Interstate 10, south to Virginia Street, and east to Mobile Bay. These two divisions may be established as separate wards or the northern division may be redesignated as part of MW-35-103-2.

4. Ward 34-100-3 is split into southeastern and northwestern divisions by a line beginning on the east at Old Shell Road, west to East Drive, south to North Shenandoah, west to East Cumberland, south on East Cumberland and Ridgefield Road to the ward line. The residents of the southeastern area shall be reassigned to MW-34-100-2 or made a new ward.

5. Ward 35-104-2 is divided by a line beginning at the north ward boundary on Eslava Creek, running south along Eslava Creek and Dog River to old Military Road eastwardly to Dauphin Island Parkway, south to Rosedale Road, east to Brookley Field boundary and following said boundary eastwardly to Perimeter Road, thence east on Perimeter Road to Mobile Bay. The eastern portion of this ward may be designated a new ward or merged into MW-35-104-1. The western portion of this ward may be designated a new ward or merged into MW-35-104-3.

6. Nothing in this order shall prevent the defendants from changing any other ward boundaries, so long as the

boundaries described in this order for the new council districts are not disturbed.

7. The defendants shall undertake the merger or redesignation of wards immediately and shall inform each voter in an area designated or merged of the new ward designation in which he or she lives. The defendant shall work with the Board of Registrars to accomplish this task by May 1, 1977. If the defendants encounter problems with the Board of Registrars, they shall forthwith petition this court for an appropriate order, including making the Board of Registrars a party defendant.

8. The following districts for the election of members of the City Council of Mobile are hereby created and designated:

—District 1 shall consist of MW-33-98-1 and the western portion of MW-33-99-1.

—District 2 shall consist of the eastern part of MW-33-99-1, all of MW-33-99-2, MW-33-99-3, and MW-34-102-2, and the western part of MW-35-103-1.

—District 3 shall consist of MW-33-99-4, the eastern part of MW-35-103-1, MW-35-103-2, and the northern part of MW-35-103-3.

—District 4 shall consist of the southern part of MW-35-103-3, MW-34-102-3, MW-34-102-6, and MW-34-102-7.

—District 5 shall consist of MW-35-103-4, MW-35-104-1, and the eastern part of MW-35-104-2.

—District 6 shall consist of MW-35-104-3, MW-35-104-4, MW-35-104-5, and the western part of MW-35-104-2.

—District 7 shall consist of MW-34-100-1, MW-34-100-2, MW-34-101-4, MW-34-101-5, MW-34-101-6, and the southeastern part of MW-34-100-3.

—District 8 shall consist of MW-34-102-5, MW-34-102-1, MW-34-101-2, MW-34-101-3.

—District 9 shall consist of MW-34-101-1, MW-34-101-1, MW-34-100-4, and the northwestern part of MW-34-100-3.

9. The defendants shall forthwith take all steps necessary to prepare for the election of the city council and mayor.

The court reserves a decision upon the plaintiffs' claim for attorneys' fees and out-of-pocket expenses.

Done, this the 9th day of March, 1977.

/s/ Virgil Pittman

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT SOU. DIST. ALA.
FILED AND ENTERED THIS THE 9th DAY OF MARCH, 1977 MINUTE ENTRY NO. 43981
WILLIAM J. O'CONNOR, CLERK
BY DEPUTY CLERK

APPENDIX A [To Court Order]

A PLAN FOR THE MAYOR-COUNCIL FORM OF GOVERNMENT FOR THE CITY OF MOBILE

CHAPTER I

ARTICLE I

Section 1. First election. Upon this Chapter becoming applicable to the City of Mobile, the (MAYOR OF SAID CITY) shall call an election to be held on the third Tuesday in August 1977 for the election by the qualified electors of said city of nine councilmen and a mayor and the expense thereof shall be paid by said city.

Section 2. Election of first council and term of office. Council candidates shall qualify as provided in Section 10 hereof and shall meet the eligibility requirement set forth in Sections 11 and 12 hereof. Each voter in the election may cast one vote for a candidate from his district, and one vote for a candidate for mayor. Any district councilman candidate receiving a majority of the total votes cast by the electors of the district in which he is a candidate shall be elected as a district councilman in his district. If, in any district, no council candidate has received a majority, then another election shall be held upon the same day of the week three weeks thereafter to be called and held in the same mode and manner and under the same rules and regulations as the first election. In the second election there

shall be two candidates for each place upon the council to be filled in such second election; and these candidates shall be the two candidates in each such district who received the highest number of votes but who were not elected at the first election. The candidate for the council in each district receiving a majority of the votes cast in his district in the second election shall be elected, so that in the first and second elections a total of nine councilmen shall be elected. The councilmen so elected shall take office on the first Monday in October following the election. Each councilman shall hold office for four years, but shall serve until his successor shall have qualified. A councilman may succeed himself in office.

Section 3. Election of first mayor and term of office. Candidates for election as the first mayor hereunder shall qualify as provided in Section 28 hereof and shall meet the eligibility requirement in Section 29 of this Chapter. The candidate for mayor receiving the largest number of votes for the office at the first election shall be elected thereto, provided such candidate receives a majority of all votes cast for such office. If at the first election no candidate receives a majority of the votes cast for the office of mayor at such election, then another election shall be held upon the same day of the week three weeks thereafter to be called and held in the same mode and manner and under the same rules and regulations. In the second election there shall be two candidates for the office of mayor; and these candidates shall be the two who received the highest number of votes for said office at the first election, and the candidate receiving a majority vote in said second election shall be elected mayor.

Section 4. Conduct of election. The election shall be held and conducted in accordance with the provisions of Chapter 3 A of Title 37, Alabama Code of 1940, as amended, except as herein otherwise specifically provided.

Section 5. The Council. The Councilmen provided for in this article shall be known collectively as the Council of the City of Mobile and shall have the powers and duties hereinafter provided. The councilmen first elected shall qualify and take office in the manner hereinafter prescribed on the first Monday in October, following the date the election of all nine councilmen is completed, and thereupon such city shall at that time and thereby be and become organized under the Mayor-Council form of government provided under this chapter, and shall thereafter be governed by the provisions of this chapter.

ARTICLE II

LEGAL STATUS: FORM OF GOVERNMENT: POWERS

Section 6. Legal Status. When this Mayor-Council form of government becomes applicable to the City of Mobile it shall continue its existence as a body corporate under the name of "City of Mobile". The word "city" as hereinafter used shall mean and refer to City of Mobile. The City shall continue as a municipal corporation, within the corporate limits as now established and as may hereafter be fixed in the manner prescribed by law, subject to all duties and obligations then pertaining to or incumbent upon it as a municipal corporation and shall continue to enjoy all the rights, immunities, powers and franchises then enjoyed by

it, as well as those that may thereafter or hereinafter be granted to it.

Section 7. Form of government. The municipal government of said city proceeding under this chapter shall be known as the "Mayor-Council form of government". Pursuant to the provisions and limitations of this chapter and subject to the limitations imposed by the Constitution of Alabama and its laws, all powers of the city shall be vested in the council elected as herein provided and hereinafter referred to as "the Council", which shall enact ordinances, adopt budgets and determine policies. All powers of the city shall be exercised in the manner prescribed by this chapter, or if the manner be not prescribed by this chapter, then in such manner as may be prescribed by law or by ordinance.

Section 8. Powers of City. The City shall have all the powers granted to municipal corporations and to cities by the Constitution and laws of this State together with all the implied powers necessary to carry into execution all the powers granted.

ARTICLE III

THE COUNCIL

Section 9. Number, election, term. The council shall consist of nine members, who shall be known and elected as district councilmen. The nine district councilmen shall be elected from districts which shall be, as near as practicable, of equal population according to the last Federal Decennial

Census. The regular election shall be held on the third Tuesday in August preceding the expiration of the term of office of the members of the council, the expense thereof to be paid by said city, for the election by the qualified voters of such city of nine councilmen. Such election shall be held and conducted in accordance with the provisions of Chapter 3 A of Title 37, Alabama Code of 1940, as amended, except as otherwise provided by this plan, and Section 2 hereof shall apply to all subsequent elections.

Section 10. Statement of candidacy. Any person desiring to become a candidate in any election for the office of district councilman may become such candidate by filing in the office of the City Clerk, a statement in writing of such candidacy and an affidavit taken and certified by a notary public that such person is duly qualified to hold the office for which he desires to be a candidate. Such statement shall be filed not less than 42 days and not more than 82 days immediately preceding the day set for such election and shall be in substantially the following form: "State of Alabama, Mobile County. I, the undersigned, being first duly sworn, depose and say that I am a citizen of the City of Mobile, in said State and County, and reside at _____ in said City of Mobile, that I desire to become a candidate for the office of district councilman for the _____ district, in said city at the election for said office to be held on the ____ day of August next and that I am duly qualified to hold said office if elected thereto and I hereby request that my name be printed upon the official ballot at said election. Signed _____; Subscribed and sworn to before me by said _____ on this ____ day of _____, 19____, and filed in this office for record on said day, _____, City Clerk". Said statement shall be accompanied by a qualifying fee in the amount of $50.00

which fee shall be paid into the general fund of the City. A person may also become a candidate for the office of district councilman by filing a verified pauper's oath with the City Clerk, or by filing a verified petition containing an endorsement of candidacy by the signatures and addresses of 500 persons, each of whom is a registered voter residing in the city and within the district for which the individual intends to be a candidate for election to office, provided that no such signature may be obtained more than twelve (12) months immediately preceding the deadline for filing statements of candidacy. No primary election shall be held for the nomination of candidates for the office of councilman and candidates shall be nominated only as hereinabove provided.

Section 11. Qualification. Every person who shall be elected or appointed to the office of member of council, shall, on or before the first Monday of October following his election or before the Tuesday following the date of his appointment qualify by making oath that he is eligible for said office and will execute the duties of same according to the best of his knowledge and ability. Said oath may be administered by any person authorized to administer an oath under the laws of the State of Alabama and filed in the office of the City Clerk.

Section 12. Eligibility. Councilmen shall be qualified electors of the City, shall be residents of the district which they represent, and shall reside in the district during their term of office.

Section 13. Compensation. Each councilman shall receive as compensation for his services as such the sum of

Fifty ($50.00) Dollars for each meeting of the council attended, provided that the total of such compensation shall not exceed the sum of Thirty-six Hundred ($3,600.00) Dollars per annum. Such salary shall be payable in monthly installments at the end of each month. The council may fix a separate and additional stipend for the President of the Council, not to exceed One Hundred ($100.00) Dollars per month.

Section 14. Presiding Officer. The council shall elect an officer of the city who shall have the title of President of the Council and shall preside at meetings of the council. The council shall also elect a President pro tem, who shall act as President of the Council during the absence or disability of the President. The terms of office of the President and the President pro tem shall be for a term of two years and they may succeed themselves. If a vacancy shall occur in the office of the President of the Council, the council shall elect a successor for the completion of the unexpired term. Both the President of the Council and the President pro tem shall be elected from among the councilmen.

Section 15. Powers. All powers of the city, including all powers vested in it by this chapter, by the laws general and local, of the State, and by Title 62 of the *Code of Alabama* of 1940, as amended, and the determination of all matters of policy, shall be vested in the council. Without limitation of the foregoing, the council shall have power to:

(a) Confirm or deny confirmation to the Mayor's appointments of the members of all boards, commissions or other bodies authorized hereunder or by law. This provision does not apply to officers and employees in the administrative service of the city.

(b) Succeed to all the powers, rights and privileges

conferred upon the former governing body of the city by statutes in effect at the time this chapter becomes applicable and not in conflict herewith.

Section 16. Council not to interfere in appointments or removals. Neither the council nor any of its members shall direct or request the appointment of any person to, or his removal from, office or position by the mayor or by any of his subordinates, or in any manner take part in the appointment or removal of officers and employees in the administrative service of the city except as otherwise provided herein. Except for the purpose of inquiry, the council and its members shall deal with the administrative service solely through the mayor, but councilmen may report complaints and make inquiries and requests. The council nor any member thereof shall give orders to any subordinates of the mayor, either publicly or privately, but may report complaints and make requests. Such requests will not have any legal or binding force and effect.

Section 17. Vacancies in council. Vacancies in the council shall be filled by the council at the next regular or any subsequent meeting of the council, and if the term of office in which the vacancy occurs has less than one year before the expiration of the same, the person elected by the council shall hold office until the next regular city council election. If the term of office in which a vacancy occurs has more than one year to run before the expiration of the same then a special election shall be held to fill said unexpired term. If any general or special election is to be held in the city not more than 120 nor less than 60 days following the occurrence of a vacancy then the election to fill such vacancy on the council shall be held in conjunction with

such general or special election, otherwise a special election shall be called by the Mayor on a date set by him, and shall be held in accordance with the provisions of this chapter and the general laws of the State of Alabama, applicable to such city.

Section 18. Creation of new departments or offices; change of duties. The council by ordinance may create, change and abolish offices, departments, or agencies, other than the offices, departments and agencies established by this chapter. The council by ordinance may assign additional functions or duties to offices, departments or agencies established by this chapter, but may not discontinue or assign to any other office, department or agency any function or duty assigned by this chapter to a particular office, department or agency.

Section 19. City Clerk. The City Clerk of the city serving under the merit system at the time this chapter becomes applicable to the city shall continue to hold office as the City Clerk under the Mayor-Council form of government of such city, and his successor shall be selected and hold office subject to the provisions of such civil service or merit system. The council, with the concurrence of the mayor shall be the appointing authority in filling any vacancy in the office of city clerk. The City Clerk shall give notice of special or called meetings of the council, shall keep the journal of its proceedings, shall authenticate by his signature and record in full in a book kept for such purpose all ordinances and resolutions and shall perform such other duties as shall be required by this chapter or by ordinance, and such duties as are imposed by general law of Alabama upon city clerks and as to which other provisions are not made in this chapter.

Section 20. Induction of council into office; meetings of council. The first meeting of each newly elected council for induction into office, shall be held at ten o'clock in the morning on the first Monday in October next following its election, after which the council shall meet regularly at such times as may be prescribed by its rules, but not less frequently than once a week. All meetings of the council shall be open to the public.

Section 21. Council to be judge of qualifications of its members. The council shall be the judge of the election and qualifications of its members and for such purpose shall have power to subpoena witnesses and require the production of records, but the decision of the council in any such case shall be subject to review by the courts.

Section 22. Rules of procedure; journal. The council shall determine its own rules and order of business. It shall keep a journal of its proceedings and the journal shall be open to public inspection.

Section 23. Meetings, passage of ordinances, etc. The council shall hold regular public meetings on Tuesday of each and every week at a regular hour to be fixed by the order of said council from time to time and publicly announced; it may hold such adjourned, called, special or other meetings as the business of the city may require. The president of the council, when present, shall preside at all meetings of said council. Five members of the council shall constitute a quorum for the transaction of any and every power conferred upon said council, and the affirmative vote of at least four members of the council, provided such four constitute a majority of those voting, shall be sufficient for

the passage of any resolution, by-law or ordinance, or the transaction of any business of any sort by the said council or the exercise of any of the powers conferred upon it by the terms of this chapter or by law, or which may hereafter be conferred upon it. No resolution, by-law or ordinance granting any franchise, appropriating any money for any purpose, providing for any public improvements, any regulation concerning the public health, or of any other general or permanent nature, except the proclamation of quarantine, shall be enacted except at a regular public meeting of said council or an adjournment thereof. Every ordinance introduced at any and every such meeting shall be in writing and read before any vote thereon shall be taken, and the yeas and nays thereon shall be recorded; provided that if the vote of all councilmen present be unanimous, it may be so stated in the journal without recording the yeas and nays. A record of the proceedings of every meeting of the council shall be kept, and every resolution or ordinance passed by the council must be recorded and the record of the proceedings of the meeting shall, when approved by the council, be signed by the president of the council and the city clerk. Such records shall be kept available for inspection by all citizens of such city at all reasonable times. No ordinance of permanent operation shall be passed at the meeting at which it was introduced except by unanimous consent of all members of the council present, and such unanimous consent shall be shown by the yea and nay votes entered upon the minutes of said meeting; provided, however, that if all members of the council present vote for the passage of the ordinance and their names are so entered of record as voting in favor thereof, it shall be construed as giving unanimous consent to the action upon such ordinance at the meeting at which it is

introduced. All ordinances or resolutions, after having been passed by the council, shall by the clerk be transmitted within forty-eight (48) hours after their passage to the mayor for his consideration, who, if he shall approve thereof, shall sign and return the same to the clerk, who shall publish them, if publication thereof is required, and such ordinances and resolutions shall thereupon become effective and have the force of law. Delivery to the office of the mayor shall constitute delivery to the mayor. An ordinance or resolution may be recalled from the mayor at any time before it has become a law, or has been acted on by him, by a resolution adopted by a majority of the members elected to the council, in regular or special session. If the mayor shall disapprove of any ordinance or resolution transmitted to him as aforesaid, he shall, within ten (10) days of the time of its passage by the council, return the same to the clerk with his objections in writing, and the clerk shall make report thereof to the next regular meeting of the city council; and if two-thirds of the members elected to the said council shall at said meeting adhere to said ordinance or resolution, not withstanding said objections, said vote being taken by yeas and nays and spread upon the minutes, then, and not otherwise, said ordinance or resolution shall after publication thereof, if publication is required, have the force of law. If publication of said ordinance or resolution is not required, it shall take effect upon its passage over such veto. The failure of the mayor to return to the city clerk an ordinance or resolution with his veto within ten (10) days after its passage by the council shall operate and have the same effect as an approval of the same, and the city clerk, if publication is required, shall publish the same as is herein provided for the publication of laws and ordinances of said city. And if no publication is

required, the ordinance or resolution shall become effective upon the expiration of said ten (10) days. These provisions are subject to the publication of ordinances as set out in the Alabama Code of 1940 (Recomp. 1958), Section 462, as amended Title 37. Anything in this section to the contrary notwithstanding, the mayor shall not have the power of veto over any action of the council relating to an investigation as provided for in Section 87.

Section 24. Granting of franchises. No resolution or ordinance, granting to any person, firm or corporation any franchise, lease or right to use the streets, public highways, thoroughfares, or public way of said city, either in, under, upon, along, through, or over same shall take effect and be enforced until thirty days after the final enactment of same by the council and publication of said resolution or ordinance in full once a week for three consecutive weeks in some daily newspaper published in said city or if no such newspaper exists, then by posting in three public notices, which publication shall be made at the expense of the persons, firm or corporation applying for said grant. Pending the passage of any such resolution or ordinance or during the time intervening between its final passage, and the expiration of the thirty days during which publication shall be made as above provided, the legally qualified voters of said city may, by written petition or petitions addressed to said council, object to such grant, and if during such period such written petition or petitions signed by at least ten percent (10%) of the legally qualified voters of the city shall be filed with said council, said council shall forthwith order an election, which shall be conducted by the election commission of the city or other body or official charged with the duty of conducting elections therein, at which

election the legally qualified voters of said city shall vote for or against the proposed grant as set forth in the said resolution or ordinance. In the call for said election, the said resolution or ordinance making such grant shall be published at length and in full at the expense of the city in a newspaper published in said city by one publication. If a majority of the votes cast at such election shall be against the passage of said resolution or ordinance, then and in those events, said resolution or ordinance shall not become effective nor shall it confer any rights, powers or privileges of any kind, otherwise, said resolution or ordinance and said grant shall thereupon become effective as fully and to the same extent as if said election has not been called or held. If, as the result of said election, said resolution or ordinance shall not become effective, then it shall be the duty of said council, after the results of said election shall be determined, to pass a resolution or ordinance to that effect. No grant of any franchise or lease or right of user, or any other right, in, under, upon, along, through, or over the streets, public highways, thoroughfares or public ways of any such city, shall be made or given nor shall any such rights of any kind whatever be conferred upon any person, firm or corporation, except by resolution or ordinance duly passed by the council at some regular or adjourned regular meeting and published as above provided for in this Section; nor shall any extension or enlargement of any such rights or powers previously granted be made or given except in the manner and subject to all the conditions herein provided for as to the original grant of same. It is expressly provided, however, that the provisions of this Section shall not apply to the grant of side track or switching privileges to any railroad for the purpose of reaching and affording railway connections, and switch privileges to the owners or users of

any industrial plan, store or warehouse; provided further, that said track or switch shall not extend for a greater distance than one thousand, three hundred twenty feet.

Section 25. Codification authorized. The council may provide at any time it may deem proper, for the revision and codification of its ordinances, by-laws, and permanent resolutions, or for the adoption of a code or codes by ordinance. Such code or codes and the revisions or amendments thereof may relate to the whole system of city by-laws, ordinances and permanent resolutions, or may relate to that portion of such ordinances, by-laws and permanent resolutions which relate to, affect or purport to govern any particular subject or subjects or subdivisions of municipal legislation. The council shall have full power and authority to prescribe the manner in which said code or codes, revisions, or amendments thereto, shall be made public, whether by proclamation of any officer or officers of said city by posting or by publication, one or all, but it shall not be necessary unless so prescribed by the council for such code or codes, revisions or amendments thereto, to be published in a newspaper or newspapers. Nor shall it be necessary that such code or codes, revisions or amendments thereto, be spread at length upon the minutes, but they will be noted in the minutes. The council may prescribe that such code or codes, revisions or amendments thereto may be certified by and filed with the city clerk, or other corresponding officer, in lieu of spreading at length the same on the minutes; and the council may prescribe the manner in which copies of such code or codes, revisions, or amendments thereto, may be officially certified for use by the inhabitants or by the courts. The council may adopt and provide for the maintenance in a designated office of the city of a comprehensive zone map of the city open for

inspection by the public at all reasonable times, and may make such zone map a part of any ordinance by reference thereto in such ordinance and without publication of such zone map in any newspaper. Such zone map need not be in one piece but may for convenience be in sections. A zone map of territory newly added to the city shall be treated as a comprehensive zone map of the city for purposes of application of the provisions of the next preceding sentence. These provisions are subject to the publication of ordinances, etc., as set out in the Alabama Code of 1940 (Recomp. 1958), Section 462, as amended, Title 37.

Section 26. Examination of books and publication of accounts. The council shall each month print in pamphlet form a detailed statement of all receipts and expenses of the city, and a summary of its proceedings during the preceding month, and furnish printed copies thereof to the daily newspapers of the city, other members of the news media of the city, and to persons who apply therefor. At the end of each year, the council shall cause a full and complete examination of all the books and accounts of the city to be made by a certified public accountant, or by the state department of examiner of public accounts, and shall cause the result of such examination to be published in the manner above provided for publication of statements of monthly expenditures. Such examination shall not be made more than two years in succession by the same accountant.

ARTICLE IV

MAYOR

Section 27. The mayor, election, term, qualification. The first mayor shall be elected at the same election at which the councilmen are elected under the provisions of Sections 1 and 3 of this chapter. The first mayor shall qualify and take office in the manner hereinafter prescribed. The mayor shall take office on the first Monday in October in the same year of election, and shall serve for four years. The regular election for mayor shall be held on the third Tuesday in August of the year during which the term of the first mayor elected hereunder terminates and every four years thereafter. The mayor elected at such regular election, shall, on or before the first Monday of October following his election qualify by making oath that he is eligible for said office and will execute the duties of same according to the best of his knowledge and ability. Said oath may be administered by any person authorized to administer an oath under the laws of Alabama. At any election for mayor the candidate receiving the highest number of votes for the office shall be elected thereto, provided such candidate received a majority of all votes cast for such office. If at the first election a majority is not received by any candidate for the office of mayor, then a second election shall be held on the third Tuesday thereafter in the same mode and manner and under the same rules and regulations provided in Sections 1 and 3 hereof with respect to election of the first mayor.

Section 28. Statement of candidacy. Any person desiring to become a candidate at any election for the office of

mayor may become such candidate by filing in the office of the City Clerk a statement in writing of such candidacy, accompanied by an affidavit taken and certified by a notary public that such person is duly qualified to hold the office for which he desires to be a candidate. Such statement shall be filed not less than 42 days and not more than 82 days immediately preceding the day set for such election and shall be in substantially the following form: "State of Alabama, Mobile County, I, the undersigned, being first duly sworn, depose and say that I am a citizen of the City of Mobile, in said State and County, reside at _____ in said City of Mobile, that I desire to become a candidate for the office of mayor in said city at the election of said office to be held on the ____ day of August next and that I am duly qualified to hold said office if elected thereto and I hereby request that my name be printed upon the official ballot at said election. Signed _____ Subscribed and sworn to before me by said _____ on this ____ day of _____, 19____, and filed in this office for record on said day, _____. City Clerk." Said statement shall be accompanied by a qualifying fee in the amount of $300.00, which qualifying fee shall be paid into the general fund of the city, or in lieu thereof a person may also become a candidate for the office of mayor by filing a verified pauper's oath with the City Clerk, or by filing a verified petition containing an endorsement of candidacy by the signatures and addresses of 2,000 persons, each of whom is a registered voter residing in the city, provided that no such signature may be obtained more than twelve (12) months immediately preceding the deadline for filing statement of candidacy.

Section 29. Eligibility. The mayor shall be a qualified elector, and a resident of the city, and shall reside within the city during his term of office.

Section 30. Compensation. The mayor shall receive an annual salary in the sum of Thirty Thousand ($30,000.00) Dollars, payable in monthly installments at the end of each month, said installments to be paid at the same rate for any portion of the month during which the mayor shall hold office at the rate thus provided.

Section 31. Vacancy in office of mayor. Whenever any vacancy in the office of mayor shall occur by reason of death, resignation, removal or any other cause, the president of the council shall assume the duties of the office of mayor effective on the date such vacancy occurs and shall serve as acting mayor until a new mayor is elected and qualified as hereinafter provided. The acting mayor shall receive no compensation, expenses or allowances as a councilman while acting as mayor, but he will receive the same rate of pay and allowances provided for the mayor whose vacated office he fills, and the compensation received for days of service as acting mayor shall not be counted in determining the maximum annual per diem compensation permitted council members. While the president of the council is serving as acting mayor he may attend council meetings but not vote on any matters before the council. The council shall within five (5) days of the occurrence of the vacancy in the office of the mayor call a special election to fill such vacancy, such election to be held on a Tuesday not less than forty-five (45) days and not more than sixty (60) days from the occurrence of such vacancy; provided; however, if a regular or special election is scheduled or required to be held within one hundred twenty (120) days after the occurrence of such vacancy but more than fifty (50) days after such occurrence, then the vacancy in the office of mayor will be filled at such regular

or special election. Notice of such election shall be given at the expense of the city by one publication not less than forty-five (45) days in advance of the same in one or more newspapers published in such city. The method, procedure and requirements of qualifying, voting upon and determining the successful candidate shall be the same as is provided herein relative to the election of the mayor at regular elections, except that statements of candidacy must be filed not less than thirty (30) days immediately preceding the date set for such election. The successor to the mayor chosen at any such election shall qualify for office as soon as practical thereafter, and shall be clothed with and assume the duties, responsibilities and powers of such office immediately upon such qualification, and shall hold office for the unexpired term of his predecessor and until his successor is elected and qualified.

Section 32. The mayor; powers and duties. The mayor shall be the head of the administrative branch of the city government. He may attend council meetings but not vote in its proceedings and he shall have the power and duties herein conferred. He shall be responsible for the proper administration of all affairs of the city, and subject to the provisions of any civil service or merit system law applicable to such city and except as otherwise provided herein, he shall have power and shall be required to:

(1) Enforce all laws and ordinances.

(2) Appoint and, when necessary for the good of the service, remove all officers and employees of the city except as otherwise provided by this chapter, except as he may authorize the head of a department or office to appoint and remove subordinates in such department or office, all subject to any Merit System provision in effect at such time.

(3) Appoint all members of boards, commissions or other bodies authorized herein or by law, subject to the confirmation by the council. When any appointment is sent to the council for confirmation and the council fails to either confirm or deny confirmation of the appointment for a period of thirty days the appointment shall be deemed confirmed without action by the council. This provision for appointment of members of boards, commissions or other bodies authorized herein or by law shall supersede any different provisions for appointment of such members contained in any statute or ordinance in effect at the time this chapter becomes effective, and shall include power to remove any member of the board, commission or body to the same extent as might be done by the preceding governing body of the city, and to appoint another in his stead. And wherever any statute provides that the chief executive officer of the city is designated to act in any capacity ex-officio, the mayor shall act.

(4) Exercise administrative supervision and control over all departments created by this chapter or by law or hereafter created by the council, except those otherwise given independent status under this chapter.

(5) Keep the council fully advised as to the financial conditions and needs of the city; prepare and submit the budget annually to the council and be responsible for its administration after its adoption; prepare and submit, as of the end of the fiscal year, a complete report on the financial and administrative activities of the city for such year.

(6) Recommend to the council such actions as he may deem desirable.

(7) Prepare and submit to the council such reports as may be required of him.

(8) Perform such other duties as may be prescribed by this chapter.

(9) Fix the salaries or compensation of all officers and employees of the city who are appointable by him, subject, however, to the provisions of any civil service or merit law applicable to the city.

Section 33. Administrative departments. There shall be a department of finance and such other departments as may be established by ordinance upon the recommendation of the mayor.

Section 34. Directors of departments. At the head of each department there shall be a director, who shall be an officer of the city and shall have supervision and control of the department subject to the mayor. Two or more departments may be headed by the same individual, the mayor may head one or more departments, and directors of departments may also serve as chiefs of divisions.

Section 35. Departmental divisions. The work of each department may be distributed among such divisions thereof as may be established by ordinance upon the recommendation of the mayor. Pending the passage of an ordinance or ordinances distributing the work of departments under the supervision and control of the mayor among specific divisions thereof, the mayor may establish temporary divisions.

Section 36. Chief Administrative Assistant to the Mayor. The mayor is hereby authorized to employ for and on behalf of the city an employee to be known as Chief Administrative Assistant to the Mayor, to serve at the pleasure of the mayor, to define the duties of said employee, and to fix compensation at a salary not in excess of the highest non-

elected employee of the municipality. The Chief Administrative Assistant to the mayor shall perform such administrative and supervisory duties related to the office of the mayor as the mayor may delegate; shall keep informed of all developments within the various departments of the city government and may analyze and recommend procedures and administrative changes for such departments; shall assist the mayor in coordinating the preparation of the executive budget; shall review personnel action requests prior to submission to the mayor; shall make feasibility studies of major proposals eminating from the city council and various other duties as assigned by the mayor. The Chief Administrative Assistant to the Mayor as employed hereunder must reside within the city during the term of employment. Said Chief Administrative Assistant to the Mayor shall not be subject to the provisions of any merit system. This section shall not limit the authority of said mayor to appoint other employees of said city under civil service or otherwise authorized by any law.

Section 37. Executive Secretary. The mayor is hereby authorized to employ for and on behalf of the city an employee to be known as Executive Secretary to serve at the pleasure of the mayor, to define the duties of said employee, and to fix compensation at a salary not in excess of the highest paid non-elected employee of the municipality. The duties of the Executive Secretary shall be the coordinating and planning of the mayor's public appearances, appointments, and press relations, as well as to assist the mayor in making feasibility studies of major policy proposals eminating from the city council, monitoring the activities of the city council and various other duties as the mayor may delegate. The Executive Secretary employed hereunder must reside within the city during the term of

employment. Said Executive Secretary shall not be subject to the provisions of the merit system. This section shall not limit the authority of said mayor to appoint other employees of said city under civil service or otherwise where authorized by any other law.

ARTICLE V

BUDGET

Section 38. Fiscal year. The fiscal year of the city government shall begin on the first day of October and shall end on the last day of September of each calendar year. Such fiscal year shall also constitute the budget and accounting year. As used in this chapter, the term "budget year" shall mean the fiscal year for which any particular budget is adopted and in which it is administered.

Section 39. Submission of budgets. On a day to be fixed by the council but in no case later than the 20th day of August in each year, the mayor shall submit to the council:

(a) A separate current revenue and expense budget for the general operation of the city government, to be known as the "general fund budget";

(b) A budget for each public utility owned and operated by such city;

(c) A capital budget; and

(d) A budget message.

When submitting the budgets to the council, the mayor shall submit his recommendation of new sources of revenue or manner of increasing existing sources of revenue, sufficient to balance the budgets, if such additional revenue is necessary to accomplish that purpose.

Section 40. Preparation of budgets. It shall be the duty of the head of each department, and each other office or agency supported in whole or in part by the city, to file with the Director of Finance, at such time as the mayor may prescribe, estimates of revenue and expenditure for that department, office or agency for the ensuing fiscal year. Such estimates shall be submitted on the forms furnished by the Director of Finance and it shall be the duty of the head of each department, office or agency, to supply all the information which the Director of Finance may require to be submitted thereon. The Director of Finance shall assemble and compile these estimates and supply such additional information relating to the financial transactions of the city as may be required by the mayor in the preparation of the budgets. The mayor shall hold such hearings as he may deem advisable and with the assistance of the Director of Finance shall review the estimates and other data pertinent to the preparation of the budgets and make such revisions in such estimates as he may deem proper, subject to the laws of the State of Alabama and any municipal ordinance relating to obligatory expenditures for any purpose.

Section 41. Scope of General Fund Budget. The general fund budget shall include only the net amounts estimated to be received from or to be appropriated to each public utility. The general fund budget shall be prepared in accordance with accepted principles of municipal accounting and budgetary procedures and techniques, and shall show:

(a) such portion of the general fund cash surplus as it is estimated will exist, at the end of the current fiscal year, and is proposed to be used for meeting expenditures in the general fund budget for the ensuing year;

(b) an estimate of the receipts from current ad valorem

taxes on real estate and tangible personal property during the ensuing fiscal year, assuming that the percentage of the levy collected be no greater than the average percentage of the levy collected in the last three completed tax years.

(c) an estimate of receipts from all other sources of revenue, provided that the estimated receipts from each such source shall not exceed the percentage of estimated revenue in the current fiscal year from the same source, over the amount of the revenue received from the same source in the last completed fiscal year, unless a law or ordinance under which revenue from any source is derived, has been amended or a new source of revenue has been provided by law or ordinance, in the course of the current year, in which case the estimated receipts from that source may be fixed by the mayor. If additional revenue is to be derived from the State, the amount fixed by the mayor shall not exceed the amount which the proper State official shall certify in writing to be the reasonable expectation of receipts from such source;

(d) a statement to be furnished by the Director of Finance of the debt service requirements for the ensuing year;

(e) an estimate of the general fund cash deficit, if any, at the end of the current fiscal year and of any other obligations required by law to be budgeted for the ensuing fiscal year;

(f) an estimate of expenditures and appropriations for all other purposes to be met from the general fund in the ensuing fiscal year. All the estimates shall be in detail showing receipts by sources and expenditures by operating units, character and object, so arranged as to show receipts and expenditures as estimated for the current fiscal year and actual receipts and expenditures for the last fiscal year,

in comparison with estimated receipts and recommended expenditures for the ensuing fiscal year.

Section 42. A balanced budget. In no event shall the expenditures recommended by the mayor in the general fund budget exceed ninety-eight (98%) percent of the receipts estimated, taking into account the estimated cash surplus or deficit at the end of the current fiscal year, as provided in the preceding section, unless the mayor shall recommend an increase in or levy of new or increased taxes or licenses within the power of the city to levy and collect in the ensuing fiscal year, the receipts from which, estimated on the basis of the average experience with the same or similar taxes during the three full tax years last past, will make up the difference. If estimated receipts exceed estimated expenditures, the mayor may recommend revisions in the tax and license ordinances of the city in order to bring the general fund budget into balance. The same balanced budget restrictions shall apply in the adoption of any public utility budget.

Section 43. The budget message. The budget message shall contain the recommendations of the mayor concerning the fiscal policy of the city, a description of the important features of the budget plan, an explanation of all salient changes in each budget submitted, as to estimated receipts and recommended expenditures as compared with the current fiscal year and the last preceding fiscal year, and a summary of the proposed budgets showing comparisons similar to those required by Section 41 above.

Section 44. Availability of budgets for Inspection and Publication of the Budget Message. The mayor shall cause the budget message to be printed, mimeographed or

otherwise reproduced for general distribution at the time of its submission to the council and sufficient copies of the proposed general fund, public utility and capital budgets to be made, to supply copies to each member of the council and each daily newspaper of general circulation published in the city and all other members of the news media in the city, and two copies to be deposited in the office of the city clerk where they shall be open to public inspection during regular business hours.

Section 45. Publication of Notice of Public Hearing. At the meeting of the council at which the budget and budget message are submitted, the council shall determine the place and time of the public hearing on the budget, and shall cause to be published a notice of the place and time, not less than seven days after the date of publication, at which the council will hold a public hearing. Publication shall be made at least once in a daily newspaper published and of general circulation in the city. At the time and place so advertised, or at any time and place to which such public hearing shall from time to time be adjourned, the council shall hold a public hearing on the budget as submitted, at which any citizen of the city shall be given an opportunity to be heard, for or against the estimates of any item thereof.

Section 46. Action by the council on the general fund budget. After the conclusion of the public hearing the council may insert new items of expenditures or may increase, decrease or strike out items of expenditure in the general fund budget, except that no item of expenditure for debt service, or any other item required to be included by this chapter or other provision of law, shall be reduced or stricken out. The council shall not alter the estimates of

receipts contained in the said budget except to correct omissions or mathematical errors and it shall not cause the total of expenditures as recommended by the mayor to be increased without a public hearing on such increase, which shall be held not less than three days after notice thereof by publication in a newspaper of general circulation published in the city. The council shall in no event adopt a general fund budget in which the total of expenditures exceeds nine-eight percent of the receipts and available surplus, estimated as provided in Section 41 of this chapter unless at the same time it adopts measures for providing additional revenue in the ensuing fiscal year, estimated as provided in Sections 39 and 42 of this chapter, sufficient to make up the difference.

Section 47. Adoption of General Fund Budget. Not later than the 20th day of September of the current fiscal year, the council by a majority vote shall adopt the general fund budget, and such ordinance providing for additional revenue as may be necessary to put the budget in balance, including a 2% reserve. If for any reason the council fails to adopt the general fund budget on or before such day, the general fund budget of the current fiscal year shall be the general fund budget for the ensuing year, until such time as a newly revised budget shall be adopted by the council, and, until such time, shall have full force and effect to the same extent as if the same had been adopted by the council, notwithstanding anything to the contrary in this chapter.

Section 48. Expenditure Line Item, Veto by Mayor. If the mayor shall disapprove of any expenditure line item contained in the budget transmitted to him by the council, he shall, within ten (10) days of the time of its passage by

the council, return the same to the clerk with his objections in writing, and the clerk shall make report thereof to the next regular meeting of the city council, and if two-thirds of the members elected to the said council shall at said meeting adhere to said expenditure line item by yeas and nays and spread upon the minutes, then and not otherwise, said expenditure line item shall become effective.

Section 49. Effective Date of Budget; Certification; Copies Made Available. Upon final adoption, the budget shall be in effect for the budget year. A copy of the budget, as finally adopted, shall be certified by the mayor and city clerk and filed in the office of the Director of Finance. The budget so certified shall be printed, mimeographed or otherwise reproduced and sufficient copies thereof shall be made available for the use of all offices, departments and agencies and for the use of the citizens of the city who request a copy.

Section 50. Utility Budgets. Separate budget estimates for any public utilities owned and operated by the city shall be submitted to the Director of Finance at the same time as the budget estimates of other departments, and in the form prescribed by the Director of Finance. The mayor shall present to the council the budget for the utility operation, itemizing the receipts and expenditures in manner and form as is generally provided for in Section 41 of this chapter as being applicable to the general fund budget.

Section 51. Work Plan and Allotments. After the current expense budgets have been adopted and before the beginning of the fiscal year the head of each department, office, and agency,shall submit to the mayor in such form as he shall prescribe a work program which shall show the requested allotments of the appropriations for such

department, office or agency for the entire fiscal year by monthly or quarterly periods as the mayor may direct. Before the beginning of the fiscal year the mayor shall approve, with such amendments as he shall determine, the allotments for each such department, office, or agency, and shall file the same with the Director of Finance who shall not authorize any expenditure to be made from any appropriation except on the basis of approved allotments, provided that such allotments shall be in conformity with the salaries established by ordinance, the provisions of any merit or civil service system applicable to such city, the laws of the State of Alabama and any municipal ordinances of such city, relating to obligatory expenditures for any purpose. The aggregate of such allotments shall not exceed the total appropriation available to each such department, office, or agency for the fiscal year. An approved allotment may be revised during the fiscal year in the same manner as the original allotment was made. If at any time during the fiscal year the mayor shall ascertain that the revenue cash receipts of the general fund or any public utility for the year plus any cash surplus available from the preceding year, will be less than the total appropriations to be met from such receipts and said surplus, he shall reconsider the work and allotments of the departments, offices and agencies, and, subject to the laws of the State of Alabama and any municipal ordinances of the city relating to obligatory expenditures for any purpose, revise the allotments so as to forestall the incurring of a deficit; provided, however, that there shall be no reduction in salaries except by order of the council, or as authorized by law.

Section 52. Transfers of Appropriations. The mayor may at any time authorize, at the request of any department,

office, or agency, the transfer of any unencumbered balance or portion thereof in any general fund appropriation from one classification of expenditure to another within the same department, office or agency. At the request of the mayoir, the council may by resolution transfer any unencumbered balance or portion therefof in any general fund appropriation from one department, office or agency to another.

Section 53. Additional Appropriations. Appropriations in addition to those contained in the original general fund budget ordinance, may be made by the council by not less than five affirmative votes, but only on the recommendation of the mayor and only if the Director of Finance certifies in writing that there is available in the general fund a sum unencumbered and unappropriated sufficient to meet such appropriation.

Section 54. Emergency Appropriations. At any time in any budget year, the council may, pursuant to this Section, make emergency appropriations to meet a pressing need for public expenditures, for other than a regular or recurring requirement, to protect the public health, safety or welfare. Such appropriation may be made by the council, by not less than five affirmative votes, but only on the recommendation of the mayor. The total amount of all emergency appropriations made in any budget year shall not exceed five per centum of the total general fund operating appropriations made in the budget for that year.

Section 55. Appropriations to Lapse. Any portion of an appropriation remaining unexpended and unencumbered at the close of the fiscal year, shall lapse.

Section 56. Capital Budget. At the same time that he

submits the general fund budget, the mayor shall submit to the council a capital improvement program covering all recommended capital improvement projects, for the ensuing fiscal year and for the four fiscal years thereafter, with his recommendation as to the means of financing the improvements proposed for the ensuing fiscal year. The council shall have the power to accept with or without amendments or reject the proposed program and proposed means of financing for the ensuing fiscal year; and may from time to time during the fiscal year amend by ordinance adopted by at least five affirmative votes, the program previously adopted by it, or the means of financing the whole or any part thereof or both, provided that the amendment shall have been recommended by the mayor and further, provided such additional funds are available in the general fund or in any other fund of the city available therefor. The council shall adopt a capital budget prior to the beginning of the fiscal year in which the budget is to take effect. No appropriations for a capital improvement project contained in the capital budget shall lapse until the purpose for which the appropriation was made shall have been accomplished or abandoned, provided that any project shall be deemed to have been abandoned if three fiscal years lapse without any expenditure from or encumbrance of the appropriation therefor. Any such lapsed appropriation shall be applied to the payment of any indebtedness incurred in financing the project concerned and if there be no such indebtedness shall be available for appropriation.

Section 57. Certification of Funds; Penalties for Violation. No payment shall be made and no obligation incurred by or on behalf of the city except in accordance with an appropriation duly made and no payment shall be

made from or obligation incurred against any allotment or appropriation unless the Director of Finance shall first certify that there is a sufficient unexpended and unencumbered balance in such allotment or appropriation to meet the same; provided that nothing herein shall be taken to prevent the advance authorization of expenditures for small purchases as provided in subsection (e) of Section 64 of this chapter. Every expenditure or obligation authorized or incurred in violation of the provisions of this chapter shall be void. Every payment made in violation of the provisions of this chapter shall be deemed illegal and every official who shall knowingly authorize or make such payment or knowingly take part therein and every person who shall knowingly receive said payment or any part thereof shall be jointly and severally liable to the city for the full amount so paid or received. If any officer, member of the board, or employee of the city, shall knowingly incur any obligation or shall knowingly authorize or make any expenditure in violation of the provisions of this chapter or knowingly take part therein, such action shall be cause for his removal. Nothing in this section contained, however, shall prevent the making of contracts of lease or for services providing for the payment of funds at a time beyond the fiscal year in which such contracts are made, provided the nature of such transactions will reasonably require the making of such contracts.

Section 58. Reserve for Permanent Public Improvements. The council may by ordinance establish a reserve fund for permanent public improvements and may appropriate thereto any portion of the general fund cash surplus not otherwise appropriated at the close of any fiscal year. Appropriations from the said fund shall be made only to finance improvements included in the capital budget.

Section 59. Budget Continuation. Any official adopted budget in existence at the time that the council is first organized shall continue in force and effect during the balance of the city's then fiscal year, or until such time as the mayor may submit to the council and the council adopts, an amended, altered or revised budget for the balance of said fiscal year.

Section 60. Budget Summary. At the head of the budget there shall appear a summary of the budget, which need not be itemized further than by principal sources of anticipated revenue, stating separately the amount to be raised by property tax, kinds of expenditures itemized according to departments, doing so in such manner as to present to the taxpayers a simple and clear summary of the detailed estimates of the budget.

ARTICLE VI

DEPARTMENT OF FINANCE

Section 61. Director of Finance; appointment. There shall be a department of finance, the head of which shall be the Director of Finance, who shall be appointed by the mayor, subject to provisions of civil service or the merit system applicable to the city. He shall be the chief Financial Officer of the city.

Section 62. Director of Finance; qualifications. The director of finance shall be a person skilled in municipal accounting, taxation, and financial control.

Section 63. Director of Finance, surety bond. The Director of Finance shall provide a bond with such surety and in such amount as the council may require by resolution or ordinance. The premium on said bond shall be paid by the city.

Section 64. Director of Finance; powers and duties. The Director of Finance shall have general management and control of the several divisions and units of the Department of Finance. He shall have charge, subject to the direction and control of the mayor, of the administration of the financial affairs of the city, and to that end shall have authority and be required to:

(a) cooperate with the mayor in compiling estimates for the general fund, public utility and capital budgets;

(b) supervise and control all encumbrances, expenditures and disbursements to insure that budget appropriations are not exceeded;

(c) prescribe and install systems of accounts for all departments, offices, and agencies of the city and provide instructions for their use; and prescribe the form of receipts, vouchers, bills or claims to be used and of accounts to be kept by all departments, offices, and agencies of the city;

(d) require daily, or at such other intervals as he may deem expedient, a report of receipts from each of such departments, offices and agencies, and prescribe the time and the manner in which moneys received by them shall be paid to the office of the Director of Finance or deposited in a city bank account under his control;

(e) examine all contracts, purchase orders and other documents, except bonds and notes which create financial obligations against the city, and approve the same only upon ascertaining that money has been appropriated and

allotted therefor and that an unexpended and unencumbered balance is available in such appropriation and allotment to meet the same, provided that the Director of Finance may give advance authorization for the expenditure from any appropriation for the purchase of supplies, materials, or equipment of such sum, within the current allotment of such appropriation as he may deem necessary during a period of not to exceed the ensuing three calendar months for the purchase of items not to exceed in cost One Hundred Dollars for any one item, and immediately encumber such appropriation with the amount of such advance authorization, and thereafter, within the period specified, purchase orders for such items, to an aggregate not exceeding such authorization, shall be valid without the prior approval of the Director of Finance endorsed thereon, but each such purchase order shall be charged against such authorization and no such purchase order, which together with all such purchase orders previously charged with the period specified shall exceed the amount of such authorization shall be valid;

(f) have custody of all public funds belonging to or under the control of the city, or any office, department or agency of the city government and deposit all funds coming into his hands in such depositories as may be designated by resolution or ordinance of the council, or, if no such resolution or ordinance be adopted, by the mayor, subject to the requirements of law as to surety and the payment of interest on deposits. All such interest shall be the property of the city and shall be accounted for and credited to the proper account. He shall not be liable for any loss sustained as to funds of the city that are on deposit in such a designated bank or depository;

(g) audit and approve before payment, all bills, invoices,

payrolls and other evidences of claims, demands or charges against the city government and with the advice of the department of law, determine the regularity, legality and correctness of such claims, demands or charges;

(h) have custody of all investments and invested funds of the city or in its possession in a fiduciary capacity, unless otherwise provided by this chapter, or by law, ordinance or the terms of any trust, and the safeguarding of all bonds and notes of the city and the receipt and delivery of city bonds and notes for transfer, registration and exchange;

(i) have supervision over the preparation of bond ordinances, bonds, advertisements for sale of bonds, preparation of bond prospectuses, conduct of sale of bonds, and delivery of bonds, all subject to provisions of law and municipal ordinances, applicable thereto. Bonds shall be authenticated by the manual signature of the Director of Finance and shall bear the facsimile signature of the mayor and a facsimile of the seal of the city. Interest coupons transferable by delivery shall be attached to the bond and shall be authenticated by the facsimile signature of the Director of Finance;

(j) supervise and direct the placing of all types of insurance carried by the city where the premiums in whole or in part are paid by the city, or the premiums in whole or in part are withheld through the payrolls; the amount of all types of insurance on which the city pays the premiums in whole or in part shall be determined by the council after a recommendation by the mayor;

(k) submit to the mayor for presentation to the council not later than the twelfth day of each month, a statement showing in reasonable detail the revenues received by the city during the preceding month, the revenues received during that fiscal year up to and through the end of the preceding month, the expenditures made during the

preceding month, and the accumulated expenditures made during that fiscal year up to and through the end of the preceding month, together with a comparison of said items with the budget estimates;

(l) furnish to the head of each department, office or agency of the city a copy of that portion of the statement as required in item (k) of this section, as same is related to his department, office or agency;

(m) prepare and submit to the mayor at the end of each fiscal year, for the preceding year, a complete financial statement and report of the financial transactions of the city;

(n) designate, with the approval of the Mayor, and subject to the provisions of any merit or civil service system applicable to such city, an employee of the department of finance as deputy director of finance who during the temporary absence or incapacity of the director of finance shall have and perform all the powers and duties conferred or imposed upon the director of finance;

(o) protect the interests of the city by withholding the payment of any claim or demand by any person, firm or corporation against the city until any indebtedness or other liability due from such person, firm or corporation shall first have been settled and adjusted;

(p) collect all special assessments, license fees and other revenues of the city for whose collection the city is responsible and receive all money receivable by the city from the county, state or federal government, or from any court, or from any office, department or agency of the city;

(q) with approval of the mayor to inspect and audit any accounts or records of financial transactions which may be maintained in any office, department or agency of the city government apart from or subsidiary to the accounts kept in his office;

(r) supervise through the division of purchases as provided for in Section 67 of this chapter and be responsible for the purchase, storage and distribution of all supplies, materials, equipment and other articles used by any office, department or agency of the city government.

Section 65. When contracts and expenditures prohibited. No officer, department or agency shall, during any budget year, expend or contract to expend any money or incur any liability, or enter into any contract which by its terms involves the expenditure of money, for any purpose, in excess of the amounts appropriated for that general classification of expenditure pursuant to this chapter. Any contract, verbal or written, made in violation of this chapter shall be null and void. Nothing in this Section contained, however, shall prevent the making of contracts or the spending of money for capital improvements to be financed in whole or in part by the issuance of bonds, nor the making of contracts of lease or for services for a period exceeding the budget year in which such contract is made, when such contract is permitted by law.

Section 66. Fees shall be paid to city government. All fees received by any officer or employee of the city, shall belong to the city government and shall be paid daily to the department of finance.

Section 67. Division of purchases. There shall be established in the department of finance a division of purchases, the head of which shall be the city purchasing agent. The purchasing agent, pursuant to rules and regulations established by resolution or ordinance, shall contract for, purchase, store and distribute all supplies,

materials and equipment required by any office, department or agency of the city government. The purchasing agent shall also have power and shall be required to:

(a) Establish and enforce specifications with respect to supplies, materials, and equipment required by the city government;

(b) Inspect or supervise the inspection of all deliveries of supplies, materials and equipment, and determine their quality, quantity and conformance with specifications;

(c) Have charge of such general storerooms and warehouses as the council may provide by resolution or ordinance;

(d) Transfer to or between offices, departments or agencies, or sell surplus, obsolete, or unused supplies, material and equipment;

(e) Perform such other duties as may be imposed upon him by resolution or ordinance.

Section 68. Competitive bidding. Before the purchasing agent makes any purchase of or contract for supplies, materials or equipment, he shall give ample opportunity for competitive bidding, under such rules and regulations and with such exceptions as the council may prescribe by resolution or ordinance, provided, however, that the council shall not exempt individual contracts, purchases, or sales from the requirement of competitive bidding.

Section 69. Contracts for city improvements. Any city improvement costing more than $2,000 shall be executed by contract except where such improvement is authorized by the council to be executed directly by a city department in conformity with detailed plans, specifications and estimates. All such contracts for more than $2,000 shall be

awarded to the lowest responsible bidder after such public notice and competition as may be prescribed by resolution or ordinances, provided the mayor shall have the power to reject all bids and advertise again. Alteration in any contract may be made when authorized by the council upon the written recommendation of the mayor. Nothing in this or Section 68 shall be construed to supersede or nullify provisions of state law requiring or governing competitive bidding.

Section 70. Accounting control of purchase. All purchases made and contracts executed by the purchasing agent shall be pursuant to a written requisition from the head of the office, department or agency whose appropriation will be charged, and no contract or order shall be issued to any vendor unless and until the director of finance certifies that there is to the credit of such office, department or agency, a sufficient unencumbered appropriation balance to pay for the supplies, materials, equipment or contractual service for which the contract or order is to be issued.

Section 71. Borrowing in anticipation of revenues. In any budget year, in anticipation of the collection or receipt of revenues of the budget year, the council may by resolution authorize the borrowing of money by the issuance of negotiable notes of the city, each of which shall be designated "revenue note for the year 19____ (stating the budget year)". Such notes may be renewed from time to time; but all such notes, together with the renewals thereof, shall mature and be paid not later than the end of the fiscal year after the budget year in which the original notes have been issued. Such borrowing shall be subject to any limitation on amount provided by statute.

Section 72. Borrowing to meet emergency appropriations. In the absence of unappropriated available revenues to meet emergency appropriations under the provisions of Section 53, the council may by resolution authorize the issuance of notes, each of which shall be designated "emergency note" and may be renewed from time to time, but all such notes of any fiscal year and any renewals thereof shall be paid not later than the last day of the fiscal year next succeeding the budget year in which the emergency appropriation was made.

Section 73. Notes redeemable prior to maturity. No notes shall be made payable on demand, but any note may be made subject to redemption prior to maturity on such notice and at such time as may be stated in the note.

Section 74. Sale of notes; report of sale. All notes issued pursuant to this chapter may be sold at not less than par and accrued interest at private sale without previous advertisement.

ARTICLE VII

SUCCESSION IN GOVERNMENT

Section 75. Rights of officers and employees preserved. Nothing in this chapter contained, except as specifically provided, shall affect or impair the rights or privileges of officers or employees of the city or of any office, department or agency existing at the time when this chapter shall take effect or any provision of law in force at the time when the Mayor-Council form of government shall become applicable and not inconsistent with the provisions of this

chapter in relation to the personnel, appointment, ranks, grades, tenure of office, promotion, removal, pension and retirement rights, civil rights or any other rights or privileges of officers or employees of the city or any office, department or agency thereof.

Section 76. Continuance of present officers. All persons holding administrative office at the time the Mayor-Council form of government becomes effective shall continue in office and in the performance of their duties until provisions have been made in accordance therewith for the performance of such duties or the discontinuance of such office. The powers conferred and the duties imposed upon any office, department or agency of the city by the laws of the State, if such office, department or agency shall be abolished by this chapter, or under its authority, be thereafter exercised and discharged by the office, department or agency designated by the council unless otherwise provided herein.

Section 77. Status of officers and employees holding positions when the Mayor-Council form of government becomes effective. Any person holding an office or position in the classified service of the city under any civil service or merit system applicable to the city when the Mayor-Council form of government shall become effective shall be continued as such officer or employee in the classified service of the city under the Mayor-Council form of government and with the same status, rights and privileges and subject to the same conditions under such applicable civil service or merit system as if the Mayor-Council form of government had not become applicable.

Section 78. Transfer of records and property. All records, property and equipment whatsoever of any office, department or agency or part thereof, all the power and duties of which are assigned to any other office, department or agency by this chapter, shall be transferred and delivered to the office, department, or agency to which such powers and duties are so assigned. If part of the powers and duties of any office, department or agency or part thereof are by this chapter assigned to another office, department or agency, all records, property and equipment relating exclusively thereto shall be transferred and delivered to the office, department or agency to which such powers and duties are so assigned.

Section 79. Continuity of offices, departments or agencies. Any office, department or agency provided for in this chapter with a name or with powers and duties the same or substantially the same as those of an office, department or agency heretofore existing shall be deemed to be a continuation of such office, department or agency and until otherwise provided, shall exercise its powers and duties in continuation of their exercise by the office, department or agency by which the same were heretofore exercised and, until otherwise provided, shall have power to continue any business, proceeding or other matter within the scope of its regular powers and duties commenced by an office, department or agency by which such powers and duties were heretofore exercised. Any provision in any law, rule, regulation, contract, grant or other document relating to such a formerly existing office, department or agency, shall, so far as not inconsistent with the provisions of this chapter, apply to such office, department or agency provided for by this chapter.

Section 80. Continuance of contracts and public improvements. All contracts entered into by the city, or for its benefit, prior to the application to such city of the Mayor-Council form of government, shall continue in full force and effect. Public improvements for which legislative steps have been taken under laws existing at the time of the organization under the Mayor-Council form of government may be carried to completion as nearly as practicable in accordance with the provisions of such existing laws.

Section 81. Pending actions and proceedings. No action or proceedings, civil or criminal, pending at the time of the organization under the Mayor-Council form of government, brought by or against the city or any office, department or agency or officer thereof, shall be affected or abated by the change to the Mayor-Council form of government or by anything contained in this chapter; but all such actions or proceedings may be continued notwithstanding that functions, powers and duties of any office, department or agency or officer party thereto may by or under this chapter be assigned or transferred to another office, department or agency or officer, but in that event the same may be prosecuted or defended by the head of the office, department or agency to which such functions, powers and duties have been assigned or transferred by or under this chapter.

Section 82. Pension and Relief Funds. All laws and parts of laws relating to pensions or retirement and relief funds for policemen, firemen and other employees of the city, contained in the general or local laws of the State or in Title 62 of the Code of Alabama, as amended, as the same may apply and be in effect with respect to the City of Mobile at the time when such city shall become governed by the

provisions of this chapter, shall continue in full force and effect, and without interruption or change as to any rights which have been acquired thereunder.

Section 83. Park, playground and fairground authority. All laws and parts of laws relating to establishment of an authority for fairgrounds, parks, exhibits, exhibitions and other installations, facilities and places for the amusement, entertainment, recreation and cultural development of the citizens of a city, and for the powers, authority, mode of financing and conduct of the same, contained in the general or local laws of the State or in Title 62 of the Code of Alabama, as amended, as the same may apply and be in effect with respect to any city at the time when such city shall become organized under the provisions of this chapter, shall continue in full force and effect, and without interruption or change as to the establishment or conduct of any authority created thereunder, after application of the Mayor-Council form of government to such city.

Section 84. Continuance of ordinances and resolutions. All ordinances and resolutions of the city in effect at the time of this court's decree dated the 21st day of October, 1976, as last amended, and the Mayor-Council form of government herein set up becomes effective shall continue in effect unless and until changed or repealed by the council.

ARTICLE VIII

GENERAL PROVISIONS

Section 85. Removal of officers and employees. Subject to the provisions of any civil service or merit system applicable to the city, any officer or employee to whom the mayor, or a head of any office, department or agency, may appoint a successor, may be removed by the mayor or other appointing officer at any time, and the decision of the mayor, or other appointing officer shall be subject to appeals therefrom, if any, provided by applicable law.

Section 86. Right of mayor and other officers in council. The mayor, the heads of all departments, and such other officers of the city as may be designated by the council, shall be entitled to attend meetings of the council, but shall have no vote therein, the mayor shall have the right to take part in the discussion of all matters coming before the council, and the directors and other officers shall be entitled to take part in all discussions of the council relating to their respective offices, departments or agencies.

Section 87. Investigations by council or mayor. The council, the mayor, or any person or committee authorized by either of them, shall have power to inquire into the conduct of any office, department, agency or officer of the city and to make investigations as to municipal affairs, and for that purpose may subpoena witnesses, administer oaths, and compel the production of books, papers and other evidence.

Section 88. Contracts extending beyond one year. No contract involving the payment of money out of the

appropriation of more than one year shall be made for a period of more than five years, nor shall any such contract be valid unless made or approved by resolution or ordinance.

Section 89. Employees not to be privately interested in city's contracts. No city employee shall be interested, directly or indirectly, in any contract for work or material, or the profits thereof, or services to be furnished or performed for the city. The mayor and councilmen shall recuse themselves from any and all official acts or duties in which they have in interest, directly or indirectly, in any contract for work or material, or the profits thereof, or services to be furnished or performed for the city.

Section 90. Official Bonds. The director of finance, and such other officers or employees as the council may by general ordinance require so to do, shall give bond in such amount with such surety as may be approved by the council. The premiums on such bonds shall be paid by the city.

Section 91. Oath of Office. Every officer of the city shall, before entering upon the duties of his office, take and subscribe to the following oath or affirmation, to be filed and kept in the office of the city clerk:

> "I solemnly swear (or affirm) that I will support the Constitution and will obey the laws of the United States and of the State of Alabama, and that I will, in all respects, observe the provision of the ordinances of the City of Mobile, and will faithfully discharge the duties of the office of _____."

Section 92. Reapportionment. Whenever there shall be a change in the population in any of the nine districts

heretofore established, evidenced by a federal census of population published following a decennial federal census hereafter taken beginning in 1990, there shall be a reapportionment of the council districts in the manner hereinafter provided.

(1) The mayor shall within six months after the publication of the 1990 federal census, and each decennial federal census thereafter of the population of the city, file with the council a report containing a recommended plan for the reapportionment of the council district boundaries to comply with the following specifications:

(a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall be the centerlines of streets or other well defined boundaries.

(b) Each district shall contain as nearly as is reasonable the same population.

(2) The report shall include a map and description of the districts recommended and shall be drafted as a proposed ordinance and considered by the council as other ordinances are considered. Once filed with the clerk, the report shall be treated as an ordinance introduced by a council member.

(3) The council shall enact a redistricting ordinance within six months after receiving such report. If the council fails to enact the redistricting ordinance within the said six months, the redistricting plan submitted by the mayor shall become effective without enactment by the council, as if it were a duly enacted ordinance.

(4) Such redistricting ordinance shall not apply to any regular or special election held within six months after its becoming effected. No incumbent councilman or member of the board or commission shall be deprived of his unexpired term of office because of such redistricting.

APPENDIX B [To Court Order]
[Caption omitted in printing]

PLAINTIFFS' PLAN H

Pursuant to the instructions of this Court plaintiffs herein submit a plan for nine districts in the City of Mobile and a ward breakdown showing the number of black citizens residing in each ward according to the 1970 Census.

The black population figures used in this plan and listed in the ward summary are *total* black population figures recently calculated by Mr. Still and Mr. Menefee from 1970 Census data, as the Court requested. They should be distinguished from the "weighted" black population figures set out in plaintiffs' earlier submissions, which are based on black voter age percentages.

This plan has a deviation of three percent. It involves five changes in the present ward structure. Only one of these changes would require the creation of a new ward so as to maintain the present house and senate districts. Of course, the election officials might desire to create additional wards for their own or the voters' convenience.

Ward 33-99-1 is split into east and west wards. The dividing line starts at the south of Stanton, north to Costarides, west of Summerville, north to Andrews, east to the ward line:

East	868	Population	848	Blacks
West	11,841	"	11,841	"

The voters in the eastern area could be assigned to vote in MW-33-99-2.

Ward 35-103-1 is split into east and west wards. The dividing line starts at the west, east on Davis Avenue to

Kennedy, south to the ward line:

East	7,098	Population	7,056	Blacks
West	1,848	"	1,845	"

This requires the creation of a new ward in the western section since shifting those voters into the adjoining MW-33-99-3 would cross a house and senate line.

Ward 35-103-3 is split north and south. Begin on the north at Broad Street, south to Elmira, east to Dearborn Street, south to New Jersey, east to Warren Street, north to Delaware, east to Interstate 10, south to Virginia Street, east to the Mobile Bay:

North	3,818	Population	3,367	Blacks
South	5,085	"	2,801	"

The voters in the northern area could be assigned to vote in MW-35-103-2.

Ward 34-100-3 is split by a line beginning on the[e]ast at Old Shell Road, west to East Drive, south to North Shenandoah, west to East Cumberland, south to Ridgefield Road, south on Ridgefield to the ward line:

Southeast	772	Population	0	Blacks
Northwest	6,235	"	1,567	"

The voters in the southeastern area could be assigned to vote in MW-34-100-2.

Ward 35-104-2 is split into a "Brookley ward" and a west ward. The Brookley ward is bounded on the north by the ward boundary; on the west by Eslava Creek and Dog River; on the south by Old Military Road, Dauphin Island Parkway, Rosedale Road, the Brookley Boundary, and Perimeter Road; on the East by Mobile Bay:

Brookley	1,426	Population	28	Blacks
West	2,088	"	249	"

The voters in the western area could be assigned to vote in MW-35-104-3.

Description of Districts

District	*Ward*	*Population*	*Black*
1	33-98-1	9,438	6,065
	33-99-1-W	11,841	11,841
		21,279	17,906
2	33-99-1-E	868	848
	33-99-2	8,664	8,505
	33-99-3	4,510	4,483
	34-102-2	4,896	173
	35-103-1-W	1,848	1,845
		20,786	15,854
3	33-99-4	5,536	5,521
	35-103-1-E	7,098	7,056
	35-103-2	4,672	2,170
	35-103-3-N	3,818	3,367
		21,124	18,114
4	35-103-3-S	5,085	2,801
	34-102-3	4,244	56
	34-102-4	2,704	4
	34-102-6	5,280	234
	34-102-7	3,872	2,975
		21,185	6,070

5	35-103-4	11,419	4,331
	35-104-1	8,091	512
	35-104-2-Brookley	1,426	28
		20,936	4,871
6	35-104-2-W	2,088	249
	35-104-3	8,416	571
	35-104-4	6,029	52
	35-104-5	4,767	87
		21,294	959
7	34-100-1	3,122	169
	34-100-2	2,078	164
	34-101-4	5,833	0
	34-101-5	5,664	193
	34-101-6	3,489	0
	34-100-3-SE	772	0
		20,958	526
8	34-102-5	6,914	0
	34-102-1	4,793	1,093
	34-101-2	4,196	154
	34-101-3	5,520	85
		21,423	1,332
9	34-101-1	7,310	9
	34-100-3-NW	6,235	1,567
	34-100-4	7,760	19
		21,305	1,595

Analysis

District	Population	% of Optimum	#Black	%Black
1	21,279	100.7	17,906	84
2	20,786	98.4	15,854	76
3	21,124	100.0	18,114	86
4	21,185	100.3	6,070	29
5	20,936	99.0	4,871	23
6	21,294	100.7	959	5
7	20,958	99.3	526	3
8	21,423	101.4	1,332	6
9	21,305	100.1	1,595	7
Range	637	3.0		

Ward Population

MW	Population	#Black
33-98-1	9,438	6,065
33-99-1	12,709	12,689
33-99-2	8,664	8,505
33-99-3	4,510	4,483
33-99-4	5,536	5,521
34-100-1	3,122	169
34-100-2	2,078	164
34-100-3	7,007	1,567
34-100-4	7,760	19
34-101-1	7,310	9
34-101-2	4,196	154
34-101-3	5,520	85
34-101-4	5,833]	
34-101-5	5,664]	193

34-101-6	3,489]	
34-102-1	4,793	1,093
34-102-2	4,896	173
34-102-3	4,244	56
34-102-4	2,704	4
34-102-5	6,914	0
34-102-6	5,280	234
34-102-7	3,872	2,975
35-103-1	8,946	8,901
35-103-2	4,672	2,170
35-103-3	8,903	6,168
35-103-4	11,419	4,331
35-104-1	8,091	512
35-104-2	3,514	277
35-104-3	8,410	571
35-104-4	6,029	52
35-104-5	4,767	87
	190,290	67,227

Exhibit A hereto shows the proposed district boundaries of Plan H on a city map.

Respectfully submitted this 2nd day of November, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

By: /s/ J. U. Blacksher
J.U. BLACKSHER
LARRY MENEFEE

EDWARD STILL, ESQUIRE
SUITE 601 - TITLE BUILDING
2030 THIRD AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

JACK GREENBERG, ESQUIRE
CHARLES WILLIAMS, ESQUIRE
SUITE 2030
10 COLUMBUS CIRCLE
NEW YORK, N.Y. 10019

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I do hereby certify that on this the 2nd day of November, 1976, I served a copy of the foregoing PLAINTIFFS' PLAN H upon counsel of record, Charles Arendall, Esquire, David Bagwell, Esquire, Post Office Box 123, Mobile, AL 36601, depositing same in United States Mail, postage prepaid or by hand.

/s/ J. U. Blacksher
Attorney for Plaintiffs

APPENDIX E

[caption omited in printing]

ORDER

The plaintiffs on the 28th day of April, 1978, petitioned this court to set an election date for the mayor and councilmen pursuant to this court's order dated October 21, 1976, which was affirmed by the Fifth Circuit Court of Appeals on March 29, 1978.

The defendants petitioned the United States Supreme Court to stay the mayor and councilmen election pending the defendants' petition for certiorari and the Supreme Court's disposition of that petition. On May 15, 1978, by a 7-2 vote, the United States Supreme Court denied the defendants' petition for a stay.

On May 16, 1978, after a hearing on the plaintiffs' petition, with attorneys for all parties present, the court orally ordered, and hereby in writing orders, the election of the mayor and councilmen pursuant to this court's decree dated October 21, 1976, to take place on November 21, 1978, with a runoff, if necessary, on December 12, 1978. It was further stated that the term of four years of the mayor and councilmen elected at that time would be shortened until such time as their successors have been elected and qualified to take office on the first Monday in October, 1981.

This written order is to affirm and supplement those orders.

For the first elections only, to wit, the November 21, 1978, and December 12, 1978, election and runoff, Appendix "A" of this court's order dated March 9, 1977, is MODIFIED and CHANGED as follows:

At page 1, Chapter I, Article I, Section 2, the last line is modified by changing

"the first Monday in October following the elections"

to read

"January 2, 1979".

At page 2, Chapter I, Article I, Section 2, line 1 is modified by changing

"for four years"

to read

"until the first Monday in October, 1981".

At page 2, Chapter I, Article I, Section 5, line 5 is modified by changing

"the first Monday in October following the date the election of all nine councilmen is completed"

to read

"January 2, 1979".

At page 5, Chapter I, Article III, Section 10—Statement of Candidacy—line 8 is modified by changing

"August"

to read

"November".

At page 5, Chapter I, Article III, Section 11, last line, the following is modified by changing

"the first Monday in October following his election"

to read

"January 2, 1979".

At page 9, Chapter I, Article III, Section 20, line 15 is modified by changing

"the first Monday in October next following its election"

to read

"January 2, 1979".

At page 16, Chapter I, Article IV, Section 27, line 6 is modified by changing

"the first Monday in October in the same year of election and shall serve for four years."

to read

"January 2, 1979, and shall serve until his successor has been elected and qualified for a new term beginning the first Monday in October, 1981."

At page 17, Chapter I, Article IV, Section 28, line 12 is modified by changing

"August"

to read

"November".

In the event the United States Supreme Court should grant certiorari in this matter before November 21, 1978, the election ordered herein shall be stayed and this order, in that event, will be null and void.

Done, this the 31st day of May, 1978.

/s/ Virgil Pittman

UNITED STATES DISTRICT JUDGE

APPENDIX F

Alabama Act No. 281 (Acts 1911, p. 330), as amended, Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977)

§11-44-70. Applicability of article.

This article shall only apply to cities and towns which have heretofore adopted the same or which may hereafter elect to operate under the provisions herein contained. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §89.)

§11-44-71. Procedure for adoption—Generally.

Any city or town may adopt and become organized under the commission form of government provided in this article by proceeding as hereinafter provided. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §90.)

§11-44-72. Same—Election.

Upon the presentation of a petition signed by such number of qualified electors of any city or town to which this article is desired to apply as will equal or exceed one percent of the population of such city or town according to the last preceding federal census to the judge of probate of the county in which such city or town is located, asking that the proposition of organizing under this article be submitted to the qualified voters of such city or town, the judge of probate shall examine said petition and determine whether or not the same is signed by the requisite number of qualified electors for such city or town to authorize such election in such city or town for the purpose of adopting the provisions of this article and, if such probate judge shall find that said petition contains the requisite number of electors

to authorize such an election, he shall, within 10 days from the receipt of said petition, certify such fact to the mayor of the city or town in which such election is so petitioned. The mayor or other chief executive of such city or town, immediately upon the receipt of such certificate from the probate judge, shall call a special election to be held within 40 days thereafter for the purpose of determining whether or not said city or town shall adopt the commission form of government hereby authorized and shall give notice of the time and purpose of such election by publication once each week for four consecutive weeks in some newspaper, if any, published in said city or town and, if there be no such newspaper, then by notice posted at five public places in said city or town for 30 days. If said plan is not adopted at the special election so called, the question of adopting said plan shall not be resubmitted to the voters of said city or town for adoption within two years thereafter, and then the question to adopt said plan may be resubmitted in the manner above provided.

All qualified electors of said city or town may participate in said election, and the question submitted shall be whether or not the city or town named shall adopt the commission form of government as provided in this article, and such question shall be plainly printed upon the ballot and following the said question shall be printed the word "Yes" with a blank opposite thereto and in the next line the word "No" with a blank opposite thereto. The voter shall mark his ballot with a cross mark before or after the word which expresses his choice. No other proposition shall be submitted to the voters at such election upon said ballot. The election shall be conducted, the expense paid, the vote canvassed and the result declared in the same manner as is or may be provided by law in respect to other municipal elections.

If the majority of the votes cast shall be "Yes" or in favor of such proposition, the provisions of this article shall thereby be adopted for said city, effective October 1 of the general municipal election year next following said election, and the mayor shall transmit to the governor, to the secretary of state and to the judge of probate of the county, each, a certificate stating that such proposition was adopted for said city. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §91.)

§11-44-73. Commissioners—Election, terms of office, etc., generally.

* * *

(Acts 1915, No. 749, p. 869; Acts 1939, No. 246, p. 408; Code 1940, T. 37, §92.)

§11-44-74. Same—Election, terms of office, etc., of commissioners elected after September 1, 1945.

* * *

(Acts 1939, No. 246, p. 408; Code 1940, T. 37, §93; Acts 1951, No. 640, p. 1095.)

§11-44-75. Same—Designation of positions and election thereto.

Whenever there are one, two or three commissioners to be elected, all candidates for such position or positions shall qualify as provided in this article. The positions to be held by the commissioners shall be numbered one, two and three and any candidate who shall qualify as provided in this

article shall designate whether he is seeking to be elected to the position numbered one, two or three. The names of all such candidates shall be placed upon the ballot in three designated groups under the headings of those seeking election to the positions numbered one, two and three, respectively. All persons qualified to vote in such election shall be entitled to vote for one candidate for the position numbered one, for one candidate for the position numbered two and for one candidate for the position numbered three. Whenever a candidate for any one of the numbered positions receives a majority of all votes cast for all candidates seeking election to that position, then he shall be declared elected commissioner to the position thus numbered, and when no candidate seeking a numbered position receives a majority, then and in that event, the two candidates receiving the highest number of votes shall be declared eligible for a second election. Such second election shall be held not less than 10 nor more than 15 days from the date of the first election. The candidate who receives the highest number of votes in the second election shall be declared elected commissioner to such position. (Acts 1939, No. 246, p. 408; Code 1940, T. 37, §94; Acts 1945, No. 295, p. 490, §1.)

§11-44-76. Same—Qualifications; filling of vacancies caused by ineligibility.

The commissioners provided for by this article shall be elected by the vote of the legally qualified voters, and no person shall be eligible for such office who shall not be over the age of 19 years at the time he shall become a candidate or shall not be duly qualified to vote in the election at which he shall be elected.

In case any person, after he shall have been elected and duly qualified as commissioner, shall be declared ineligible to hold such office, a successor shall be chosen as in the case of a vacancy caused by death, resignation or any other cause. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §102.)

§11-44-77. Same—Filling of vacancies caused by death, resignation or removal.

* * *

(Acts 1911, No. 281, p. 330; Acts 1939, No. 352, p. 481; Code 1940, T. 37, §104.)

§11-44-78. Same—Filling of two or more simultaneous vacancies.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §115.)

§11-44-79. Same—Oath; bond.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §103.)

§11-44-80. Same—Compensation.

* * *

(Acts 1911, No. 281, p. 330; Acts 1939, No. 283, p. 440; Code 1940, T. 37, §105; Acts 1945, No. 295, p. 490, §4; Acts 1953, No. 315, p. 372; Acts 1955, No. 396, p. 931.)

§11-44-81. Same—Designation; qualification for and taking of office.

The commissioners provided for in this article shall be known collectively as the board of commissioners of such city or town and shall have the powers and duties provided in this article. Each of said commissioners shall qualify for office in the manner prescribed in sections 11-44-76 and 11-44-79 on or before the second Monday following the date of the election by which the board is filled or completed. As soon as they thus shall have qualified for office, all three of said commissioners shall forthwith take office and enter upon their duties. (Acts 1939, No. 289, p. 441, §1; Code 1940, T. 37, §95; Acts 1945, No. 295, p. 490, §2.)

§11-44-82. Same—Meetings.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-83. Mayor-president of board of commissioners.

Immediately upon said commissioners taking office they, by a majority vote, shall elect one of their number as mayor, and he shall be president of the board of commissioners of said city or town; and, in addition to the other duties and powers given him by the provisions of this article, he shall be invested with all of the powers, jurisdiction and functions and be charged with all the duties which may be conferred or imposed upon him by said board of commissioners, except that he shall not have the power to veto any ordinance. The mayor-president of the board of commissioners may hold that office for one year, but he may not be elected to succeed himself. (Acts 1939, No. 289, p. 441; Code 1940, T. 37, §95; Acts 1945, No. 295, p. 490, §2.)

§11-44-84. Powers and authority of board of commissioners upon organization of commission form of government; abolition of certain boards, commissions and officers; continuation of corporate existence, territorial limits, etc., of municipality.

The commissioners of such city or town, to be known as the board of commissioners of such city or town, shall have, possess and exercise all the powers and authority, legislative, executive and judicial, theretofore possessed by the mayor or governing body or bodies of said city or town, by whatsoever name called, all boards of public works, boards of police commissioners and any and all other boards and commissions, except school boards and other commissions and boards having in charge educational matters. All boards and commissions whose powers are hereby conferred upon such new board of commissioners shall stand abolished upon the organization of such new board of commissioners. Such city or town shall continue its existence as a body corporate without change of name and shall continue to be subject to all the duties and obligations then pertaining to or incumbent upon it as a municipal corporation and shall continue to enjoy all the rights, immunities, powers and franchises then enjoyed by it, as well as those that may hereafter be granted to it. All laws governing such city or town and not inconsistent with the provisions of this article shall apply to and govern said city or town after it shall become organized under the commission form of government provided by this article. All bylaws, ordinances and resolutions lawfully passed and in force in any such city or town under its former organization shall remain in force until altered or repealed according to the provisions of this article. The territorial limits of such city or town shall remain the same as under its

former organization, but all commissioners shall be elected from the city or town at large. All rights, powers and property of every description which were vested in said city or town shall vest in it under the organization provided for in this article as though there had been no change in the organization of said city or town, and no right or liability, either in favor of or against it, and no action or prosecution of any kind shall be affected by such change, unless otherwise expressly provided for by the terms of this article. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §96.)

§11-44-85. Appointment, etc., of officers and employees generally; distribution of executive and administrative powers and duties among departments.

Every city or town adopting the form of government provided for by this article shall be governed and managed by the board of commissioners provided for herein.

* * *

(Acts 1935, No. 505, p. 1083; Code 1940, T. 37, §97; Acts 1955, No. 557, p. 1219.)

§11-44-86. Assignment or delegation of powers and duties of board of commissioners.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-87. Enactment of resolutions, bylaws or ordinances generally.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-88. Procedure for adoption of resolutions, bylaws or ordinances granting franchises, etc., for use of streets, public highways, etc.; manner in which franchises, etc., extended, enlarged, etc.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §99.)

§11-44-89. Procedure for letting of contracts for construction, improvement, etc., of streets, highways, etc.

* * *

(Acts 1927, No. 390, p. 461; Code 1940, T. 37, §98.)

§11-44-90. Elections for office of commissioner—Filing and form of statement of candidacy, etc.

In every city or town which shall adopt or shall have adopted the provisions of this article, an election shall be held on the second Monday in September of each year in which the term of office of a commissioner shall expire. Any person desiring to become a candidate for commissioner at any election which may be held under the terms of this article may become such candidate by filing in the office of the mayor of said city or town, if at the first election of commissioners under this article, or with the board of commissioners at any subsequent election, a statement of such candidacy, accompanied by affidavit taken and certified by said mayor, a member of said board of commissioners or by a notary public that such person is

duly qualified to hold the office for which he desires to become a candidate. Such statement shall be filed at least 20 days before the day set for such election and shall be substantially in the following form:

"State of Alabama, ... County. I, the undersigned, being first duly sworn, depose and say that I am a citizen of the city (or town) of ..... in said state and county and reside at ..... in said city (or town); that I desire to become a candidate for the office of commissioner in said city (or town) for the term ending September 30th, 19 . . , at the election for said office to be held on the ..... day of .....; that I am duly qualified to hold said office if elected thereto, and I hereby request that my name be printed upon the official ballot at said election. (Signed) ..... Subscribed and sworn to before me by said ..... on this the ..... day of ....., 19 . . , and filed in this ofice for record on said day ..... (style of officer)."

§11-44-91. Same—Ballots; voting.

At elections for commissioners under this article the ballots shall be substantially in the following form:

For commissioner for position numbered 1 (or position numbered 2, or position numbered 3, as the case might be) of the city (or town) of ..... (insert name of city or town) for term ending September 30, 19 ....

.....

A.B.

.....

C.D.

.....

E.F.

.....

G.H.

.....

I.J.

.....

K.L.

.....

M.N.

.....

At such election the names of all candidates for commissioner who have qualified as such as provided in this article shall be printed on the ballots in alphabetical order. If more than one office is to be filled, the tickets shall be extended so as to likewise present the names of the candidates for the other offices. Each qualified elector may vote for his choice for each office to be filled. No defect in the form of the ballot or technicality or inaccuracy in such election or in the call, notice or conduct thereof shall invalidate such election if the same was in substance fairly conducted and the will of the people fairly expressed thereat.

In those municipalities where voting machines have been adopted as the means for registering or recording and computing the vote at all elections held in such municipalities, the list of candidates on the voting machines shall be so placed on the machine as to permit the voting for candidates to be conducted under the laws of this state applicable to voting machines, and the election shall be conducted in compliance with and conformity to such laws. Except as is otherwise provided in this article, all elections for commissioners hereunder shall be conducted as provided by the general laws of this state applicable thereto and at the expense of the city or towns in which such election is held. (Acts 1911, No. 281, p. 330; Acts 1939, No. 246, p. 408; Code 1940, T. 37, §101; Acts 1945, No. 295, p. 490, §3.)

§11-44-92. Filing and publication of statement of campaign expenses, etc., by commissioners.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §107.)

§11-44-93. Appointment of municipal employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §106.)

§11-44-94. Conflicts of interest of municipal officers and employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §108.)

§11-44-95. Publication, etc., of monthly statement of receipts and expenses, etc.; examination of books and accounts.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §109.)

§11-44-96. Maintenance of record books by probate judges and compensation therefor; fee for examination of petitions for elections.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §112.)

§11-44-97. Use of influence or contribution of money, etc., in elections for commissioners by municipal officers or employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §108.)

§11-44-98. Solicitation of votes by municipal employees.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §110.)

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §110.)

§11-44-99. Payment, etc., of persons to solicit votes; acceptance of pay, etc., to solicit votes.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §113.)

§11-44-100. Applicability of general state laws as to municipal elections.

All general laws of this state regulating and prescribing the conduct of municipal elections and the qualifications and registration of voters thereat shall apply to elections under this article, except when in conflict with this article. (Acts 1911, No. 281, p. 330; Code 1940, T. 37, §111.)

§11-44-101. Requirements, etc., as to petitions.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §114.)

§11-44-102. Certain persons not to receive profits, wages, etc., from municipality.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §116.)

§11-44-103. Certain persons not to become officers or employees of municipality.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §117.)

§11-44-104. Commissioners, officers or employees to receive regular compensation only.

* * *

(Acts 1911, No. 281, p. 330; Code 1940, T. 37, §118.)

§11-44-105. Adoption of ordinances by initiative and referendum.

* * *

(Acts 1915, No. 749, p. 869; Code 1940, T. 37, §119.)

APPENDIX G

Alabama Act No. 823 (Acts 1965, p. 1539)

Act No. 823 **S. 138—Tyson**

AN ACT

To provide further for the form of government of cities having populations of not less than 200,000 nor more than 300,000, according to the most recent federal decennial census, regulating the appointment and election, compensation, powers, duties, and authority of municipal officers and employees, and authorizing abandonment of the existing form of government and adoption of a mayor-council form of government.

Be It Enacted by the Legislature of Alabama:

CHAPTER 1.

Section 1. This Act shall apply to all cities having population of not less than 200,000 nor more than 300,000, according to the most recent federal decennial census, which may now or hereafter operate under a commission form of government.

CHAPTER 2.

Section 2. The three commissioners of such city, when sitting as a board and acting within their official capacity, shall have, possess and exercise for, and in the name of and on behalf of the city all municipal powers, legislative, executive and judicial, possessed and exercised by city

governing bodies and the chief executive officers thereof under the general law, except that they shall not exercise the jurisdiction of recorders. However, the city's administrative functions shall be distributed by the board of commissioners among three departments, as follows: A department of finance and administration; a department of public safety; and a department of public works and services. The commissioner holding place number one, subject to the authority of the board of commissioners, shall be charged with the duty and responsibility of directing and supervising the department of finance and administration. The commissioner holding place number two, subject to the authority of the board of commissioners, shall be charged with the duty and responsibility of directing and supervising the department of public safety. The commissioner holding place number three, subject to the authority of the board of commissioners, shall be charged with the duty and responsibility of supervising the department of public works and services. Any function, responsibility or operation of the city not assigned by the commissioners or by act of law to one of the above named departments, shall be under the direction and supervision of the board of commissioners as a whole.

Section 3. The board of commissioners of the city shall have the power and authority to select and employ all subordinate officers and employees of the city, to assign their duties, to fix their salaries or compensation, and to dismiss or remove any employee, subject to the provisions of any civil service or merit system law applicable to the city.

Section 4. The person holding the position of place

number one on the board of commissioners shall be the presiding officer of the board of commissioners and shall act as mayor of the city for the first sixteen months of his term. During the next sixteen months the person holding the position of place number two on the board shall be the presiding officer of the board and shall act as mayor, and for the final sixteen months of the term the person holding the position of place number three on the board shall be the presiding officer thereof and act as mayor. Any commissioner who desires not to serve as presiding officer and to act as mayor may decline to do so. In the event a commissioner declines to serve as presiding officer of the board and to act as mayor, the board shall elect one of the other members thereof to serve as presiding officer and to act as mayor.

* * *

Section 30. Chapter 2 of this Act shall become effective on the first Monday in October, 1969, and the remaining parts of this Act shall take effect October 4, 1965.

Approved September 2, 1965.

Time: 5:52 P.M.

APPENDIX H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-4210, 77-2042

WILEY L. BOLDEN, ET AL.,

Plaintiffs-Appellees,

v.

CITY OF MOBILE, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Alabama

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that the City of Mobile, Alabama, *et al.*, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final order entered in this action March 29, 1977, affirming the judgment of the District Court and reinstating its injunction.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

/s/ C.B. Arendall, Jr.
C.B. Arendall, Jr.
William C. Tidwell, III
Travis M. Bedsole, Jr.
Post Office Box 123
Mobile, Alabama 36601

Fred G. Collins
City Attorney
City Hall
Mobile, Alabama 36601

Charles S. Rhyne
William S. Rhyne
Donald A. Carr
Martin W. Matzen
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D. C. 20036

[Filed June 19, 1978]

Supreme Court, U. S.
FILED
NOV 16 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

VOLUME I — Pages 1 - 305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT FILED JUNE 27, 1978
PROBABLE JURISDICTION NOTED OCTOBER 2, 1978

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DOCKET - U.S. DISTRICT COURT

INIT. OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	NOS	O	R	N 23	D	DEMAND	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
528/1	75	297	06	09	75	3	441	1		X				2804		75	297-P

PLAINTIFFS

SET FOR PRE TRIAL ON: 2-4-76 SET FOR TRIAL ON: 7-12-76

DEFENDANTS Judge Pittman

BOLDEN, WILEY L.
HOPE, REV. R. L.
~~JOHNSON, CHARLES~~ DISMISSED 1-14-76
LEFLORE, JANET C.
LEFLORE, JOHN L.
MAXWELL, CHARLES
PURIFOY, OSSIE B.
SCOTT, RAYMOND
SMITH, SHERMAN
TAYLOR, OLLIE LEE
~~TURNER, ROBNEY O.~~ DISMISSED 1-14-76
WILLIAMS, ED
WILLIAMS, SYLVESTER
WILSON, MRS. F. C.

CITY OF MOBILE, ALABAMA;
GREENOUGH, GARY A.
DOYLE, ROBERT B., JR.
MIMS, LAMBERT C., ind. and in their official capacities as Mobile City Commissioners.

CAUSE

42 USC §§ 1973, 1983 & 1985(3). Acting seeking single-member districts for Mobile City Commission, attacking present "at-large" election system, and for declaratory judgment and injunction against the city holding any further elections under the present at-large election system.

ATTORNEYS

GREGORY B. STEIN
J. U. BLACKSHER
1407 Davis Avenue
Mobile, Alabama 36603

EDWARD STILL
321 Frank Nelson Building
~~Birmingham, Alabama 35203~~
Suite 601, Title Building
2030 3rd Avenue, North
Birmingham, Alabama 35203

Jack Greenberg, James M. Nabrit,III and Charles E. Williams, III
Suite 2030, 10 Columbus Circle
New York, New York 10019

Proposed intervenor HENRY REMBERT, EXECUTIVE SECRETARY, GULF COAST PARENT ACTION LEAGUE:
Henry Rembert, pro se
710 Chin St.
Mobile, Al. 36610

~~DAVID A. BLACKWELL~~
C. B. ARENDALL, JR.
Post Office Box 123
Mobile, Alabama 36601

S. R. SHEPPARD
City of Mobile Legal Dept.
Post Office Box 1827
Mobile, Alabama 36601

INTERVENORS: CHRIS M. ~~PAPACOSTAS~~ ROCOSTAS, JOE SIMSON & MIKE JACOBS
~~Daryl~~
Lionel L. Layden & A. Holmes ~~Middleton~~
919 Dauphin St., Mobile, Ala. 36604

DEPOSITIONS:
DR. JAMES EVERETT VOYLES, 02-03-76.
DR. MELTON ALONZA McLAURIN, filed June 16, 1976.
DR. CORT B. SCHLICHTING, 7-8-76
ROBERT S. EDINGTON, 7-8-76
GARY COOPER, 7-9-76
CAIN J. KENNEDY, 7-9-76
DR. CHARLES L. COTRELL, 7-12-76
DR. CHARLES L. COTRELL, (Continuation) 9-15-76.

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	DATE	FILING FEES PAID RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	CARD MAILED
	6-10-75	# 46471 - Crawford, Blacksher & Kennedy		56	
				44	

U.S. DISTRICT COURT DOCKET

DATE	NR.	PROCEEDINGS
6-9-75	1	Complaint filed, mpc
6-10-75	2	Summons issued with complaint for service on defendants, mpc
6-17-75	3	Summons returned, executed as to LAMBERT C. MIMS as Comm., lps
	4	Summons returned, executed as to LAMBERT C. MIMS, Ind., lps
	5	Summons returned, executed as to ROBERT B. DOYLE, as Comm., lps
	6	Summons returned, executed as to ROBERT B. DOYLE, Ind., lps
	7	Summons returned, executed as to GARY A. GREENOUGH, as Comm., lps
	8	Summons returned, executed as to GARY A. GREENOUGH, Ind., lps
6-26-75	9	Motion for extension of time within which to respond to complaint filed by defendants; referred to Judge Hand, lps
	10	ORDER entered setting discovery cutoff date for SEPTEMBER 26, 1975 with pretrial briefs due by OCTOBER 10, 1975; copies mailed to attorneys Blacksher, Still, Arendall and Sheppard, lps
6-26-75	11	Motion for extension of time within which to respond to complaint filed by defendants on June 26, 1975 is GRANTED; notice mailed to attorneys, lps
7-15-75	12	Interrogatories to defendants filed by plaintiffs, jb
7-22-75	13	Motion to dismiss, with memorandum attached, filed by defendants, wet,
	14	Motion to strike, with memorandum attached, filed by defendants, wet,
8-19-75	15	Answers and objections of defendants to plaintiffs' "Discovery Notice Interrogatories," filed Ajr
8-25-75	16	Defendants' Interrogatories to each plaintiff filed, Ajr
8-26-75	17	Supplemental memorandum in support of motion to dismiss filed by defendants, o'b
8-29-75		Motion to dismiss, filed by defendants July 22, 1975 and Motion to strike, filed by defendants July 22, 1975 submitted after arguments Ajr
9-26-75	18	Status Report. AMENDMENT TO STANDARD PRE TRIAL ORDER entered and DISCOVERY extended to and including Nov. 10, 1975, and naming of witnesses on or before Nov. 25, 1975. Copy of this Amendment mailed to the Attorneys of Record on 30 Sep. 1975. (W.J.C.)
10-28-5	19	Second interrogatories to defendants filed by plaintiffs, lps
	20	Motion to compel plaintiffs to answer interrogatories filed by defendants; referred to Magistrate on October 30, 1975, lps
10-29-5	21	Answers and objections to defendants' interrogatories filed by plaintiff ROBERT L. HOPE, lps
	22	Answers and objections to defendants' interrogatories filed by plaintiff WILEY L. BOLDEN, lps
	23	Answers and objections to defendants' interrogatories filed by plaintiff SHERMAN SMITH, lps
11-3-75	24	Interrogatories to the plaintiffs filed by defendants, jb
	25	Motion to compel answers of plaintiffs BOLDEN, HOPE and SMITH filed by defendants, Referred to Magistrate on 11-4-75, jb (Notices mailed to attorneys),
11-7-75	26	ORDER entered, by Magistrate, that plaintiff are to answer interrogatories of defendants within 10 days from this date (Min. Entry No. 39286), lps
11-10-5		Copies of Min. Entry No. 39286 mailed to attorneys, lps
11-13-75	27	Motion to extend discovery time an additional 30 days, filed by the plaintiffs, Ajr
		Discovery extended to and including DECEMBER 10, 1975, notices mailed to attorneys Ajr
11-14-75	28	Second request for production of documents filed by plaintiffs, jb
	29	Motion to reconsider order on motion to compel answers to interrogator filed by plaintiffs, Referred to Magistrate on 11-17-75, jb

(SEE NEXT PAGE)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 75-207-P
BOLDEN, WILEY L., ET AL	CITY OF MOBILE, ET AL	PAGE 2 OF ____ PAGES

DATE	NR.	PROCEEDINGS
11-17-75	30	Answers and objections of plaintiff SYLVESTER WILLIAMS, to defendants' interrogatories, filed, wet,
	31	Answers and objections of plaintiff CHARLES MAXWELL to defendants' interrogatories, filed, wet,
	32	Answers and objections of plaintiff EDWARD WILLIAMS to defendants' interrogatories, filed, wet,
11-18-75	33	Memorandum in support of motion to compel answers, filed by defendants, wet,
11-18-5	34	Motion to reconsider order on motion to compel answers to interrogatories filed by plaintiffs on November 14, 1975 is GRANTED by Magistrate; plaintiff given to December 4, 1975 to answer defendant's interrogatories; notice mailed to attorneys, lps
11-18-75	35	ORDER entered on defendants' motion to dismiss that insofar as the action is based on 42 USC 1985(3), complaint fails to state a cause of action & the motion to dismiss this cause as to all defendants is GRANTED. Defendants' motion to dismiss the cause of action under the Voting Rights Act of 1965, 42 USC 1973 is DENIED as to all defendants. Therefore, under 28 USC 1343(4), this court has jurisdiction of all defendants including the City of Mobile as to this cause of action; Since court has jurisdiction under 1343(4), it is unnecessary to discuss jurisdictional issue under 28 USC 1331. Motion of defendants as to the cause of action under 1973 & the attack of the jurisdiction as to 1343(4) is not well taken & is DENIED. Defendants' motion to strike attorneys' fees & the injunctive relief prayed for in paragraph V-2 is DENIED; M/E No. 39,371; Attorneys Blacksher & Ragsell advised of ruling by phone on 11-20-75; and on 11-20-75; copy of order mailed attorneys Blacksher, Still, Ragsell and Sheppard, wet,
11-21-75	36	Motion to allow further discovery of facts and opinions held by expert, Dr. James E. Voyles, filed by plaintiffs. mpc
	37	Notice of taking of deposition of DR. JAMES E. VOYLES filed by plaintiffs, mpc
11-25-75	38	Answers to Pla intiffs' second Interrogatories to Defendants filed, (je)
11-26-75		Status Report. ANSWER to be filed by next Friday. Set for Pre Trial in first week of Feb. 1976 (W.J.C.)
11-26-75	39	ORDER on plaintiffs' motion to allow further discovery of expert, DR. JAMES E. VOYLES that discovery xfrequested by plaintiffs to Dr. Voyles' dissertation is GRANTED provided the plaintiffs pay expenses pursuant to FRCP, Rule 26(b)(4)(C). Motion as to further discovery is DENIED; M/E No. 39,470; copy mailed attorneys on 12-2-75, wet,
12-3-75	40	ANSWER filed by defendants, wet,
12-4-75	41	Answers and objections of plaintiff, RAYMOND SCOTT, to defendants' interrogatories, filed, wet,
	42	Answers and objections of plaintiff JOHN L. LeFLORE, to defendants' interrogatories, filed, wet,
	43	Answers and objections of plaintiff, OSSIE BENJAMIN MURPHY, to defendants' interrogatories, filed, wet,
	44	Answers and objections of plaintiff, JANET LeFLORE, to defendants' interrogatories, jb

DC-111A (Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF | DEFENDANT | DOCKET NO. ____ PAGE 3 OF ____ PAGES

DATE	NR.	PROCEEDINGS
12-4-75	44	~~Answers and objections of plaintiff, LEILA O. BROWN, to defendants' interrogatories, filed, wet,~~
	45	~~Answers and objections of plaintiff, JEFF FRANK KIMBLE, to defendants' interrogatories, filed, wet,~~
	45	Answers and objections of plaintiff, FRANCIS GARY WILSON, to defendants' interrogatories filed, jb
	46	Answers to defendants' second interrogatories filed by plaintiffs, jb
12-8-75	47	Plaintiffs' third discovery notice (interrogatories and request for production of documents) filed, grs.
12-11-75	48	Answers and objections to plaintiffs' second request for production of documents filed by defendants, jb
12-8-75	49	Answers and objections of plaintiff, OLLIE LEE TAYLOR, to defendants' interrogatories, filed, wet,
12-12-75	50	ORDER entered on defendants' motion compelling plaintiffs, WILEY L. BOLDEN, REVEREND R. L. HOPE and SHERMAN SMITH, to answer certain interrogatories that said plaintiffs are ORDERED that they answer interrogatories as set out in order; plaintiffs are further ORDERED to file written answers within 20 days of this order; Defendants' motion is DENIED as to those numbered interrogatories as more fully set out in order and plaintiffs' objections are sustained; M/E No. 39,542; wet,
12-15-75		Copy of M/E No. 39,542 mailed attorneys, wet,
12-15-75	51	Motion for certification of class filed by plaintiffs; referred to Magistrate; notice mailed attorneys, wet,
12-17-75	52	Appearance of Counsel for plaintiffs filed by Jack Greenberg, James M. Nabrit, III and Charles E. Williams, III, Ajr
12-31-75	53	Motion to extend time in which to answer certain interrogatories filed by plaintiffs, Referred to Magistrate on 1-7-76, jb
1-7-76	54	Motion to extend time for plaintiffs to answer interrogatories GRANTED to January 8, 1976, Notices mailed to attorneys, jb
	55	Answer to plaintiffs' third discovery notice filed by defendants, jb
1--8-76	56	Supplemental Answers of plaintiff, Wiley L. Bolden, to defendants' interrogatories filed, o'b
1--8-76	57	Supplemental Answers of plaintiff, Sherman Smith, to defendants' interrogatories filed, o'b
1--8-76	58	Supplemental Answers of plaintiff, John L. LeFlore, to defendants' interrogatories filed, o'b
1--8-76	59	Motion to dismiss certain plaintiffs, RODNEY O. TURNER & CHARLES JOHNSON, without prejudice, filed by other plaintiffs, o'b
01-13-76	60	(Referred to Judge Pittman) o'b Preliminary pretrial order for pretrial set 4th day of February, 1976 entered by Judge Pittman filed, copies of order mailed to attorneys on 01-07-76 by Mrs. Madge Andress, grs.
1-14-76	60-A	Motion to dismiss plaintiffs RODNEY O. TURNER & CHARLES JOHNSON filed 1-8-76 is GRANTED, Notices mailed to attorneys, jb
1-19-76	61	Order entered that plaintiffs may maintain this action as a class action, Minute Entry No. 39,816; copies mailed to attorneys Ajr
1-20-76	62	Motion to compel compliance filed by defendants, Referred to Magistrate on 1-21-76, jb

(SEE CONTINUATION SHEET)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF: WILEY L. BOLDEN, ET AL | DEFENDANT: CITY OF MOBILE, ALABAMA | DOCKET NO. 75-297 H PAGE 4 OF ____ PAGES

DATE	NR.	PROCEEDINGS
1-20-76	63	Supplemental answers to defendants' interrogatories filed by plaintiff, jb
	64	Supplemental answers to defendants' interrogatories filed by plaintiff, jb
1-21-76	65	Motion to compel defendants to answer interrogatories and produce documents filed by plaintiffs, Referred to Magistrate, jb
1-26-76	66	Motion to dismiss certain plaintiffs without prejudice filed by plaintiffs, jb
	67	Supplemental answers to defendants' interrogatories filed by defendant PURIPOY, jb
	68	Supplemental answers to defendants' interrogatories filed by defendant TAYLOR, jb
	69	Supplemental answers to defendants' interrogatories filed by defendant LeFLORE, jb
1-28-76	70	Supplemental answer to Plaintiffs' Third Discovery Notice filed defendants, (je)
1-29-76	71	Supplemental answers of plaintiff to defendants' interrogatories filed by plaintiff MAXWELL, jb
02-03-76	72	Supplemental answers of plaintiff to defendants' interrogatories filed by plaintiff HOPE, jb
2-3-76	73	Deposition of DOCTOR JAMES EVERETT VOYLES filed, grs.
2--4-76		Joint Pretrial Document filed by parties, wet,
02-05-76	74	CASE PRE TRIED ON 4 FEB. 1976 BY JUDGE VIRGIL PITTMAN. (W.J.O.)
2-17-76	75	ORDER entered on pertrial hearing, copies mailed to attorneys by Mrs. Madge Andress, grs.
2-19-76	76	Amended Motion to compel defendants to answer interrogatories and produce documents filed by plaintiffs, Referred to Magistrate on 2-19-76, jb
2-25-76	77	Response to plaintiffs' "Amended Motion to compel defendants to answer interrogatories and produce documents" filed by defendants, jb
3-8-76	78	Specification of racially discriminatory acts filed by plaintiffs, wet,
3-10-76	79	Amendment to response to "Discovery Notice 1", filed by defendants, wet,
		Motion filed by plaintiffs on 2-17-76 is MOOT, Notices mailed to attorneys, jb
3-12-76		Status Report, no problems. Judge Pittman to set date for trial, wet,
3-12-76		Motion to dismiss certain plaintiffs without prejudice, filed by plaintiffs Jan. 26, 1976 submitted without argument, Ajr
04-02-76	80	Notice of taking the deposition of DR. JAMES E. VOYLES filed by the plaintiff, grs.
04-07-76	81	ORDER entered DISMISSING plaintiffs RAYMOND SCOTT and ED WILLIAMS without prejudice. See Min. Entry No. 40,441, copy mailed to attorneys Stein, Blacksher, Still, Greenberg, Nabrit, Williams, Bagwell, Arendall and Sheppard on 04-08-76, grs.
04-29-76	82	Subjects of defense evidence as to responsiveness filed by defendant,
5-11-76	83	Notice of taking deposition of TONY PARKER filed by defendants, jb
5-17-76	84	Notice of taking deposition of DR. CHARLES COTRELL filed by defendants, jb
05-03-76	85	Notice of taking the deposition of DR. CHARLES COTRELL filed by the defendants, grs.
6-16-76		Deposition of DR. MELTON ALONZA McLAURIN filed. mpc

DC-111A (Rev. 7/76)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 75-297-P
HOLDEN, WILEY L., ET AL	CITY OF MOBILE, ET AL	PAGE 6 OF ___ PAGES

DATE	NR.	PROCEEDINGS
10-21-76	102	Opinion and order with Findings of Fact and Conclusions of Law entered that there shall be elected in the August, 1977 municipal election, a mayor elected at-large and nine council members elected from nine single-member districts. Plaintiffs' claims for attorneys' fees & costs will be determined after a hearing on these issues. It is court's judgment that this decree this date is a final judgment & decree from which an appeal may be taken. However, in event it is not a final decree, court ex mero motu pursuant to 28 USC 1292(V) finds that a controlling question of law is involved. Court retains jurisdiction of this action to secure compliance with its decree issued contemporaneously herewith & for such other & further relief as may be equitable & just; M/E No. 42,074; copy given this date to attorneys J. U. Blacksher and David Bagwell. On 10-22-76 copy mailed attorneys Edward Still and S. H. Sheppard, wet,
10-22-76	103	JUDGMENT entered as set out in above opinion of 10/21/76; M/E No. 42,080; copy mailed attorneys, wet,
10-28-76	104	Amendment to correct opinion & order dated 10/21/76 as more fully described in amendment; M/E No. 42,121; copy mailed attorneys on 11-1-76, wet,
11-3-76	105	PLAINTIFFS' PLAN F filed, being a plan for nine districts in the City of Mobile and a ward breakdown showing the number of black citizens residing in each ward according to the 1970 census. (Map attached as Exhibit A, placed in red folder.) mpc
11-17-76	106	Motion to reconsider order of October 21, 1976 filed by defendants (intervenors) Ajr
	107	Motion to intervene as defendants under Rule 24, filed by intervenors Chris M. Zarocostas, Joe Simmon and Mike Jacobs Ajr
11-18-76	108	Notice of Appeal filed by defendants, wet,
	109	Security for costs on appeal filed by defendants, wet,
		Copy of Notice of Appeal and certified copy of docket entries to Clerk, 5th CCA, wet,
		Copy of Notice of Appeal mailed attorneys for appellees (plaintiffs), wet,
11-18-76	110	AMENDMENT to the opinion and order of 10/21/76 entered as more fully set out in amendment; M/E No. 42,272-B; copy mailed attorneys on 11/19/76, wet,
	111	AMENDMENT to the judgment entered 10/21/76 entered as more fully set out in amendment; M/E No. 42,272-A; copy mailed attorneys on 11/19/76, wet,
1-18-76		Motion to reconsider order f 10/21/76 filed by defendants-intervenors is argued and TAKEN UNDER SUBMISSION, wet,
		Motion to intervene as defendants under Rule 24 filed by intervenors CHRIS M. ZAROCOSTAS, JOE SIMMON and MIKE JACOBS is argued and TAKEN UNDER SUBMISSION, wet,

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. ___
		PAGE 7 OF ___ PAGES

DATE	NR.	PROCEEDINGS
10-21-76	96	Submission of qualifications of experts filed by defendant, with attachments, grs.
6-23-76	97	Witness list filed by plaintiffs, jb
6-24-76	98	Notice of taking deposition of CARL J. KENNEDY filed by plaintiffs, jb
	99	Notice of taking deposition of ROBERT EDINGTON filed by plaintiffs, jb
7-8-76		Deposition of DR. CORT B. SCHLICHTING filed, mpc
		Deposition of ROBERT S. EDINGTON filed, mpc
7-9-76		Deposition of GARY COOPER filed, mpc
7-9-76		Deposition of CARL J. KENNEDY filed, mpc by Plaintiffs,
7-12-76		Filing for creation of single member districts in City of Mobile filed
	90	Trial began; witnesses examined, exhibits offered & trial not being completed at 5:10 P.M., Court recessed to 7-13-76 at 9:00 A.M., M/E No. 41,268-A; copy mailed attorneys on 7-15-76, wet,
7-13-76	91	Trial resumed, witnesses examined, exhibits offered & Court recessed at 4:50 P.M. to 7-14-76 at 9:00 A.M., M/E No. 41,268-A; copy mailed attorneys on 7-15-76, wet,
7-14-76	92	Trial resumed, witnesses examined, exhibited offered & Court recessed at 4:55 P.M. to Monday, July 19, 1976, at 9:00 A.M., M.E. No. 41,289-A. Copy of M.E. 41,289-A mailed to Attorneys of Record on July 21, 1976. (W.J.O.)
7-19-76	93	Trial resumed, witnesses examined, exhibits offered & Court recessed at 5:00 P.M. to Tuesday, July 20, 1976, at 9:00 A.M., M.E. No. 41,303-A. Copy of M.E. 41,303-A mailed to Attorneys of Record on July 21, 1976. (W.J.O.)
7-20-76	94	Trial resumed, witnesses examined, exhibits offered & Court recessed at 4:45 p.m. to Wednesday, July 21, 1976, at 9:00 a.m., M. E. No. 41,318-A. Copy of M. E. No. 41,318-A mailed to attorneys of record on July 23, 1976. jrb.
7-21-76	95	Trial resumed, witnesses examined, exhibits offered & defendants rest at 5:02 p.m. The Court ordered that the trial be recessed to be set down for arguments at a later date. M. E. No. 41,323-B. Copy of M. E. No. 41,323-B mailed to attorneys of record on July 23, 1976. jrb.
09-09-76	96	Plaintiffs' submission of plans filed, grs.
9-17-76	97	TRIAL RESUMED for post-trial arguments, arguments heard, and trial RECESSED to a later date for arguments on the Plans submitted by the parties, (Minute Entry No. 41737-B). mpc
		Copies of Minute Entry No. 41737-B mailed to all attorneys of record. mpc
9-15-76		Continuation of Deposition of DR. CHARLES L. COTRELL filed, mpc
10-4-76	98	Plaintiffs' interrogatories regarding attorneys' fees filed by plaintiff, jrb.
10-13-76	99	Answer and Objection filed by all defendants, (je)
10-6-76	100	ORDER entered appointing JOSEPH N. LANGAN, ARTHUR R. OUTLAW and JAMES E. BUSKEY as committee to formulate plan for mayor-council form of government & committee is given target date to report to the court of 12-1-76; M/E No. 41,943-D; copy mailed attorneys on 10-15-76, wet,
10-14-76	101	Submission of population estimates for Plan F, filed by plaintiffs, w wet,

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 75-297-P
BOLDEN, WILEY L., ET AL	CITY OF MOBILE, ET AL	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
2-2-77	126	ORDER entered that motion to intervene filed by HENRY REMBERT, EXECUTIVE SECRETARY OF THE GULF COAST PARENT ACTION LEAGUE on 1-6-77 & amended on 1-17-77 is DENIED; M/E No. 42,840-D; on 2-4-77, copy mailed attorneys and Henry Rembert, wet,
2-15-77	127	Stipulation for temporary retention of record filed by parties, wet,
2-17-77		Certified copy of docket entries mailed to Clerk, 5th CCA and to attorneys, wet,
02-28-77		Depositions of GROVER CLEVELAND THORNTON, III, ROBERT S. VANCE, JAMES A. HARRIS, JR. & EDWARD MALCOLM FRIEND, III, grs,
3--2-77		On 2 Mar. 1977 received from the U.S. Court of Appeals, Fifth Circuit, an ORDER reading as follows: "ORDER: IT IS ORDERED that appellants' motion to enlarge the time for the filing of the record on appeal including the court reporter's transcript to and including March 4, 1977, is GRANTED." (W.J.O.)
3-4-77		Court Reporter's transcript of trial proceedings filed, 1,503 pages, wet,
3-9-77	128	ORDER entered adopting mayor-council plan (Appendix A) and plaintiffs' plan for nine single-member council districts(Appendix B), and directing that the regularly scheduled city elections in August, 1977, and each four years thereafter, the City of Mobile shall elect nine members to a city council and a mayor. One member of the City Council shall be elected by and from each district. The mayor is to be elected at-large. The Court reserved a decision upon the plaintiffs' claim for attorneys' fees and out-of-picket expenses. (Minute Entry No. 43081). mpc
		Copies of Minute Entry No. 43081 mailed to all attorneys of record, on 3-9-77. mpc
3-18-77	129	NOTICE OF APPEAL from the order of March 9, 1977, the opinion and order entered on October 21, 1976 and the judgment entered on October 22, 1976 filed by defendants, lps
	130	Application for stay pending appeal, with brief attached, filed by defendants; referred to Judge Pittman, lps
3-23-77	131	Plaintiffs' opposition to defendants' application for stay pending appeal filed, wet,
3-23-77		Application for stay pending appeal filed by defendants on 3/18/77 and plaintiffs' opposition to defendants' application for stay pending appeal filed 3/23/77 are argued & TAKEN UNDER SUBMISSION, wet,
4-7-77	132	ORDER entered STAYING the court's prior orders requiring a mayor-council election in August, 1977; directing that preparations for elections under the city commission form of government shall be held as regularly scheduled in August, 1977, all pending result of appeal to Fifth Circuit, (Minute Entry No. 43285). Copy of order delivered to J. U. Blacksher on 4-7-77; to C. E. Arendall, Jr. on 4-8-77; copies mailed to attorneys Still, Greenberg, etc. and Sheppard on 4-11-77. mpc

DC 111A REV. (1/78)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. ___
		PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
4-18-77	133	Notice of Appeal of order of 4-7-77 filed by plaintiffs, wet,
	134	Security for costs on appeal filed by plaintiffs; wet,
4-26-77	135	Stipulation for temporary retention of record filed by parties; wet,

DC 111A REV. (1/78)

DOCKET-U.S. COURT OF APPEALS

6/9/75

SUBJECT	CROSS APPEAL NO.	CASE NUMBER
CRIM. / PRIS. w/ / PRIS. w/out / 2255 w/ / 2255 w/out / SOC. SEC. / NLRB / P.C. DIV / P.C. FED / U.S. CIV / TAX / SHCV / ORDER REVIEW / CIVIL RIGHTS (X) / SOC. SEC. / CROSS APPEAL		76-421(

CIRCUIT 5 APPEAL ___ FROM Southern DISTRICT OF Alabama AT Mobile

DATE DOCKETED 11/26/76 $50 FEE PAID 11/26/76 JUDGE Virgil Pittman

DATE NOTICE OF APPEAL FILED 11/19/76

D.C. DOCKET NUMBER CA-75-297-P

4-Exp.

WILEY L. BOLDEN, Et Al.,

Plaintiffs-Appellees,

versus

CITY OF MOBILE, ALABAMA; Et Al.,

Defendants-Appellants.

RULE 30(c)

Consolidated with No. 76-3619 & 77-11
& No. 77-2042

APPEARANCE FILED-DATE	CODE	ATTORNEYS FOR APPELLANT
		Wm. C. Tidwell, P. O. Box 123, Mobile, Ala. 36601 (205)(432-5511)
12-2-76	✓	Charles B. Arendall, Jr. -do-
12-2-76	✓	Charles S. Rhyne, 1000 Conn. Ave., N.W., Suite 800, Washington, D.C. 20
		S.R. Sheppard, City Hall, City of Mobile Legal Dept., P. O. Box 1827 Mobile, Ala. 36601
6-1-77	✓	William S. Rhyne, 1000 Conn. Ave., N.W., Suite 800, Washington, D. C. 20036 (202-466-5420)

CLOSED

APPEARANCE FILED-DATE	CODE	ATTORNEYS FOR APPELLEE
		Gregory B. Stein, 1407 Davis Ave., Mobile, Ala. 36603
12-6-76	✓	J. U. Blacksher, -do-
12-6-76	✓	Larry Menefee, -do- (205) 432-1691
12-6-76	✓	Edward Still, Suite 601, Title Bldg., 2030 3rd. Ave. N., Birmingham, Ala. 35203
12-6-76	✓	Jack Greenberg, Suite 2030, 10 Columbus Circle, N.Y., N.Y. 10019
		James M. Nabrit, III, -do-
		Charles E. Williams, III, -do-
12-6-76	✓	Eric Schnapper, -do- (212) 586-8397
		AMICUS CURIAE (See Reverse for additional Amicus Attorneys)
7-21-77	✓	Dennis J. Dimsey, Atty., Civil Rights Div., Appellate Sect., U.S. Department of Justice, Washington, D.C. 20530 (for U.S.A.)

TITLE: BOLDEN, Et Al. -vs- CITY OF MOBILE, ALA., Et Al. NO. 76-421(

1. RECORD, EXHIBITS AND BRIEF INFORMATION — Filing:

- 2-28-77 Partial Record or Cert. List
- 5-23-77 Record on Appeal — No. of Vols. 5
- Supp. Record — No. of Vols.
- Second Supp. Record — No. of Vols.
- 5-23-77 Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll
- 6-3-77 Appendix ☐ (P) ☒ (M) Vols. 1+2 w/exhibits 77-2042 (J)
- Former Appeal Record
- Administrative Transcript
- Briefing Notice Issd.
- 4-19-77 Brief for Appellant (P)
- Brief for Appellant
- 5-31-77 Brief for Cr. Appellant (P-T)(J) 6-10-77 (M)(J)
- Brief for Appellee
- Brief for Cr. Appellee
- 5-31-77 Reply Brief for Appellant (M)(J)
- 7-5-77 Supp. Brief for Appellant (M)(J)
- 7-6-77 Supp. Brief for Appellee (M)(J) U.S.A. - Also fld. 76-3619
- 7-11-77 Brief for Amicus (M)(J)
- Intervenor
- Rule 13(a) Certificate

2. MISCELLANEOUS FILINGS — Filing:

- 11/26/76 Dup. Notice of Appeal and Clerk's Statement of Docket Entries
- Papers Trans. from Misc. No.
- 1-3-77 Order of DC Ext. Time to File Record to 2-17-77
- Order of DC Granting Appeal IFP
- Order of DC Appointing Counsel
- Affidavit of Financial Status
- CJA 20 Issd./Voucher Recd.
- 3-16-77 Notice of Election Rule 30(c)
- 4-13-77 Appellant's Designation
- 5-16-77 Appellee's Designation
- Designation
- Order to Show Cause –
- Local Rule 9(b) Dismissal Order
- CJA 21 for Transcript
- 3-4-77 Order of D.C. Ext. Time to file Record to 3-4-77

3. AGENCY REVIEW CASES — Filing:

- Petition for Review of Order ( ) of ☐ NLRB ☐ FPC ☐
- Application for Enforcement – NLRB
- Answer to Application for Enforcement
- Cross Application for Enforcement

4. EXTENSION Flg. Motion for:

		Order Fld.	Ext. to
2-16-77	Record, Trans. (1st)	3-1-77	3-4-77
	Appendix		
	Appellant's Brief		
	Appellant's Brief		
	Appellant's Brief		
	Appellee's Brief		
	Appellee's Brief		
	Appellee's Brief		
	Reply Brief		

5. CALENDAR INFORMATION

Rule 18 Notice Issued

Summary Panel

5-10-77 Case Assigned for 6-13-77 in ☒ EB ☐ W ☐ E ☐

Case Cont'd for Reassignment

Case Reassigned for ___ in ☐ EB ☐ W ☐ E ☐

Hearing Panel: JMW - BS - GBT

6-13-77 Case Argued ☒ by Appellants ☒ by Appellees

Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION

3-29-78 Opinion Rendered

GBT	Affirmed		
	Reversed		
	Affd. in Pt.	P.C.	JMW Conc. Spec.
	Vacated	✓ Signed	Dis.
	Dismissed	Rule 21	Dis. in Pt.

Opinion Withdrawn

Re-filed in 76-3619, 77-1196 & 77-2042
Vacated and withdrawn 4-17-78 p. 3408

7. REHEARING INFORMATION

- Mot. for Ext. – Ext. to:
- Mot. for Ext. – Ext. to:
- Petition for Rehearing ☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc
- Petition for Rehearing ☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc
- Response of
- Order Denying Rehearing ☐ Dissenting
- ☐ Opinion SS
- ☐ Order on Petition for Rehearing SS

76-4210

MOTIONS

Filing Motion to or for:	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Docket Appeal Out of Time							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
2-26-77 Consolidate Appeals (#77-2043)			✓		GBT		6-8-77
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Leave to File Supp. Record							
Hearing on Original Record							
Hearing on Orig. Rec. & Typed Brief							
Leave to File Typed Brief							
5-11-77 Leave to File Brief in Excess Pgs.		See Sec 9.	4-19-77				
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
6-10-77 Cause to File Supp. Brief (Appellants) (see 6-10-76-GBT)			✓		GBT		6-22-77
11-78 Stay of Mandate ent 4-17-78 GBT	Appellees	4-17-78		✓	GBT		4-24-78
Recall of Mandate							

OTHER DOCKET ENTRIES

Date	
2/20/76	Flg. suggestion of appellants requesting that this cause be heard and decided in conjunction with #76-3619 - Blacks United for Lasting Leadership, Inc., et al. vs. City of Shreveport, et al. and suggestion for hearing en banc. (TGG)
3/22/76	Flg. appellees' response to appellants' suggestion with respect to appellate review of this cause in conjunction with #76-3619. (TGG)
4/14/77	Flg. order DENYING petition for hearing en banc. (TGG) (Also fld 76-3619)
4/14/77	Flg. order GRANTING appellants' motions to consolidate 76-3619 and 76-4210; further order GRANTING motions to expedite appeals; further order DENYING appellees' motion to dismiss cause 76-3619.(Also fld. in 76-3619)(RAA-LRM-TGG)
4/7/77	Flg. appellants' suggestion for joint hearing with #76-2951 - Nevett, et al. v. Sides, et al. (JMW) (TGG)

CODE TO ENTRIES

ARG	– Argued
CE	– Clerk's Endorsement
E	– East Courtroom
EB	– En Banc Courtroom
F	– Filed
H	– Handwritten
J	– Sent to Judges
L	– Large
M	– Mimeo or Offset
P	– Printed
PT	– Preliminary Type
S	– Small
S9	– See Section 9
Sub	– Submitted
T	– Typed
W	– West Courtroom

JUDGMENT OR MANDATE INFORMATION

3-78	Bill of Costs
	Flg. & Entg. Judgment
	Issg. Copy of Jdgt. to Bd & Cnsl.
MAY 5 1978	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Reissd. to Clerk
	Dismissal Issd. to Clerk
7-27-78	Record on Appeal Retd. to Clerk
7-27-78	Exhibits Retd. to Clerk (all)
	Mandate Stayed to

11. SUPREME COURT INFORMATION No. 77-1844

	Preparing Proceedings on Certiorari
	Preparing Supp. Proceedings on Cert.
	Transmitting Orig. Exhibits to S.C.
	Order of S.C. – Ext. to
7-5-78	Notice of Flg. of Cert. Pet. on 6-27-78
	Order of S.C. ☐ Denied ☐ Granted
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.

Date	Filings-Proceedings
3/14/77	Flg. appellees' response to suggestion for joint hearing with #76-295 (Charles Nevett, et al.) (TGG)
3/15/77	Flg. response of appellees, Wiley L. Bolden, et al. to suggestion for joint hearing. (TGG)
4/6/77	Flg. Order GRANTING appellants' suggestion for joint hearing of this c with #76-2951 - Nevett, et al. v. Sides, etc., et al. (TGG)
4/15/77	Flg. supplemental memorandum in support of motion of appellants for leave to file brief exceeding fifty pages.
4/19/77	Flg. Order GRANTING appellants' motion for leave to file their brief i excess of 50 page limitation. (GBT)
4/19/77	Flg. appellees' motion for order restoring injunction. 4-27-77 (GBT)
4/27/77	Flg. appellants' memorandum in opposition to appellees' motion for ord restoring injunction. 4-27-77 (GBT)
5/2/77	Flg. appellees' motion for leave to file brief in excess of 70 typed pg (see 5-11-77 GBT)
5/11/77	Flg. Order CARRYING WITH THE CASE appellees' motion for order restorin injunction entered by dist. ct. (JMW/DS/GBT)
5/31/77	Flg. Order GRANTING appellees' motion for leave to file brief in exces 70 pgs. other than standard typographic printing but not to excee 90 pgs. (GBT)
6/8/77	Flg. motion of The United States to file a brief as amicus curiae. (Also Fld. in 76-3619) (Ord 6/8/77 - GBT)
6/13/77	Minute Entry - Court granted parties 20 days to file supplemental briefs to be filed simultaneously by each side in typewritten for After a bench conference the Court will stay any election until the questions in this case are decided.
6/14/77	Flg. order DENYING appellee's motion for an order restoring injunction entered by the district court; further order GRANTING appellee's motion to stay holding of elections of any kind by government of city of Mobile, Alabama, until further advice by the court. (JMW-BS-GBT)
7/11/77	Flg. Order GRANTING motion of U.S. for leave to file brief as amicus curiae. (GBT)
6/19/78	Flg. Appellants' notice of appeal to Supreme Ct.
10/6/78	Flg. Order of Supreme Ct. noting probable jurisdiction.
10/10/78	Flg. Appellees' motion to vacate order staying elections issued by Dis (see GBT 10-12-
10/12/78	Flg. Order DENYING appellees' motion to vacate order staying elections issued by Dist. Ct. (JMW/GBT).
10/27/78	Flg. Appellants' [illegible] stay of elections

SUBJECT

CIVIL	PRIS. PET.	PRIS. CIV. RTS.	ERISA	ERISA SEC.	FELAB	P.C. DIV	P.C. FED	U.S. CIV	TAX	SECY	ORGANIZED CRIME	CIVIL RIGHTS		SOCIAL	CROSS APPEAL
												X			

6/9/75

CROSS APPEAL NO. | CASE NUMBER 77-204

CIRCUIT'S APPEAL NO. FROM Southern DISTRICT OF Alabama AT Mobile

DATE DOCKETED 5/19/77 $60 FEE PAID 5/19/77 JUDGE Virgil Pittman

DATE NOTICE OF APPEAL FILED 5/18/77

D.C. DOCKET NUMBER CA-75-297-P

WILEY L. BOLDEN, ET AL.,

Plaintiffs-Appellees,

versus

CITY OF MOBILE, ALABAMA; ET AL.,

Defendants-Appellants.

Consolidated w/No. 76-4210

APPEARANCE FILED-DATE	CODE	ATTORNEYS FOR APPELLANT
5-27-77	✓	C. B. Arendall, Jr., P. O. Box 123, Mobile, Ala. 36601 [illegible]
		William C. Tidwell, III, -do-
		Travis M. Bedsole, Jr., -do-
		Fred G. Collins, City Atty., Legal Dept. of the City of Mobile, City Hall, Mobile, Ala. 36602
5-27-77	✓	Charles S. Rhyne, 1000 Conn. Ave., N.W., Suite 800, Washington, D.C. 20036
6-1-77	✓	Wilma H. Rhyne, (202-466-5420)
		Donald A. Carr, -do-
		Martin W. Matzen, -do-

CLOSED

APPEARANCE FILED-DATE	CODE	ATTORNEYS FOR APPELLEE
5-27-77	✓	Gregory B. Stein, 1307 Davis Ave., Mobile, Ala. 36603
		J. U. Blackmon, (205)432-4481 -do-
		Larry Menkes, -do-
5-27-77	✓	Edward Still, Suite 601, Title Bldg., 2030 3rd. Ave., N., Birmingham, Ala. 35203 (205)322-6611
6-1-77	✓	Jack Greenberg, Suite 2030, 10 Columbus Circle, N.Y., N.Y. 10019
		James M. Nabrit, III, -do-
		Charles E. Williams, III, -do-
6-1-77	✓	Eric Schnapper, -do- 212-586-8397

TITLE: BOLDEN, ET AL. -vs- CITY OF MOBILE, ET AL. NO. 77-204

1. RECORD, EXHIBITS AND BRIEF INFORMATION — Filing:

- 5-23-77 Partial Record or Cert. List
- Record on Appeal — No. of Vols. 2
- Supp. Record — No. of Vols.
- Second Supp. Record — No. of Vols.
- Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll
- 6-3-77 Appendix ☐ (P) ☒ (M) Vols. IV also fld. 76-4210 (M)
- Former Appeal Record
- Administrative Transcript
- Briefing Notice Issd. 5-23-77
- Brief for Appellant
- Brief for Appellant
- Brief for Cr. Appellant
- Brief for Appellee
- Brief for Appellee
- Brief for Cr. Appellee
- Reply Brief for Appellant
- Supp. Brief for Appellant
- Supp. Brief for Appellee
- Brief for Amicus
- Intervenor
- Rule 13(a) Certificate

2. MISCELLANEOUS FILINGS — Filing:

- 5/19/77 Dup. Notice of Appeal and Clerk's Statement of Docket Entries
- Papers Trans. from Misc. No.
- 9-6-77 Order of DC Ext. Time to File Record to 10-18-77
- Order of DC Granting Appeal IFP
- Order of DC Appointing Counsel
- Affidavit of Financial Status
- CJA 20 Iss'd./Voucher Recd.
- Notice of Election Rule 38(c)
- Appellant's Designation
- Appellee's Designation
- Designation
- Order to Show Cause —
- Local Rule 9(b) Dismissal Order
- CJA 21 for Transcript

3. AGENCY REVIEW CASES — Filing:

- Petition for Review of Order ( ) of ☐ NLRB ☐ FPC ☐
- Application for Enforcement – NLRB
- Answer to Application for Enforcement
- Cross Application for Enforcement

4. EXTENSION Flg. Motion for: | Order Fld. | Ext. to:

- Record, Trans.
- Appendix
- Appellant's Brief
- Appellant's Brief
- Appellant's Brief
- Appellee's Brief
- Appellee's Brief
- Appellee's Brief
- Reply Brief

5. CALENDAR INFORMATION

Rule 18 Notice Issued
Summary Panel:
6-6-77 Case Assigned for 6-13-77 in ☐ EB ☐ W ☐ E ☐
Case Cont'd for Reassignment
Case Reassigned for ____ in ☐ EB ☐ W ☐ E ☐
Hearing Panel: JRW-RS-GBT
6-13-77 Case Argued ☐ by Appellant ☐ by Appellee
Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION

6-29-77 Opinion Rendered

GBT	Affirmed				
	Reversed				
	Affd. in Pt.		P.C.	JRW	Conc. Spec.
	Vacated	✓	Signed		Dis.
	Dismissed		Rule 21		Dis. in Pt.

Opinion Withdrawn
Doc Filed - 76-4210
Mandate to Issue 7-13-77
Distributed 6-29-77 p. 3408

7. REHEARING INFORMATION

- Mot. for Ext. – Ext. to:
- Mot. for Ext. – Ext. to:
- Petition for Rehearing ☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc
- Petition for Rehearing ☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc
- Response of
- Order Denying Rehearing ☐ Dissenting ☐ Opinion 59
- ☐ Order on Petition for Rehearing 59

77-2042

MOTIONS

Motion to or for:	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Docket Appeal Out of Time							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
-26-77 Consolidate Appeals sub 6-27-77 GBT 4/26-4217			✓		GBT		6-8-77
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Leave to File Supp. Record							
Hearing on Original Record							
Hearing on Orig. Rec. & Typed Brief							
Leave to File Typed Brief							
Leave to File Brief in Excess Pgs.							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
-10-77 Leave to File Supp. Brief sub 6-8-77 GBT (appellant)			✓		GBT		6-22-77
-11-78 Stay of Mandate sub 4-17-78 GBT	Appellees	4-17-78		✓	GBT		4-24-78
Recall of Mandate							

OTHER DOCKET ENTRIES

/13/77	Minute Entry - Court granted parties 20 days to file supplemental briefs to be filed simultaneously by each side in typewritten form. After a bench conference the Court will stay any election until the questions in this case are decided.
/19/78	Flg. Appellants' notice of appeal to Supreme Ct.
10/6/78	Flg. Order of Supreme Ct. noting probable jurisdiction.
[illegible]/78	[illegible] of actions [illegible] pending [illegible]

CODE TO ENTRIES

ARG	– Argued
CE	– Clerk's Endorsement
E	– East Courtroom
EB	– En Banc Courtroom
F	– Filed
H	– Handwritten
J	– Sent to Judges
L	– Large
M	– Mimeo or Offset
P	– Printed
PT	– Preliminary Type
S	– Small
SB	– See Section B
Sub	– Submitted
T	– Typed
W	– West Courtroom

JUDGMENT OR MANDATE INFORMATION

- Bill of Costs
- Flg. & Ent'g. Judgment
- R 2 5 1978 Issg. Copy of Jdgt. to Bd & Cnsl.
- Jdgt. as Mdt. Issd. to Clerk
- Jdgt. as Mdt. Reissd. to Clerk
- Dismissal Issd. to Clerk
- 1-27-78 Record on Appeal Retd. to Clerk 2 vols
- Exhibits Retd. to Clerk
- Mandate Stayed to

II. SUPREME COURT INFORMATION No. 77-1844

- Preparing Proceedings on Certiorari
- Preparing Supp. Proceedings on Cert.
- Transmitting Orig. Exhibits to S.C.
- Order of S.C. – Ext. to
- 7-5-78 Notice of Flg. of Cert. Pet. on 6-27-78
- Order of S.C. ☐ Denied ☐ Granted
- Notice of Denial of Pet. for Rehearing
- Opinion of S.C. dated
- Judgment of S.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILEY L. BOLDEN, REV. R.L. HOPE, CHARLES JOHNSON, JANET O. LEFLORE, JOHN L. LEFLORE, CHARLES MAXWELL, OSSIE B. PURIFOY, RAYMOND SCOTT, SHERMAN SMITH, OLLIE LEE TAYLOR, RODNEY O. TURNER, REV. ED WILLIAMS, SYLVESTER WILLIAMS AND MRS. F. C. WILSON,

Plaintiffs;

vs.

CITY OF MOBILE, ALABAMA; GARY A. GREENOUGH, ROBERT B. DOYLE, JR., AND LAMBERT C. MIMS, individually and in their official capacities as Mobile City Commissioners,

Defendants.

CIVIL ACTION NO. 75-297H

COMPLAINT

I.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1343. The amount in controversy exceeds $10,000.00 exclusive of interest and costs. This is a suit in equity arising out of the Constitution of the United States, the First, Thirteenth, Fourteenth, and Fiftteenth Amendments, and 42 U.S.C. Sec. 1973, 1983 and 1985 (3).

II.

Class Action

Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 (a) and 23 (b) (2), Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of black citizens of the City of Mobile, Alabama. All such persons have been, are being, and will be adversely affected by the defendants' practices complained of herein. There are common questions of law and fact affecting the rights of the members of this class, who are, and continue to be, deprived of the equal protection of the laws because of the election system detailed below. These persons are so numerous that joinder of all members is impracticable. There are questions of law and fact common to plaintiffs and the class they represent. The interests of said class are fairly and adequately represented

by the named plaintiffs. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

III.

Parties

A. Plaintiffs Wiley L. Bolden, Rev. R. L. Hope, Charles Johnson, Janet O. LeFlore, John L. LeFlore, Charles Maxwell, Ossie B. Purifoy, Raymond Scott, Sherman Smith, Ollie Lee Taylor, Rodney O. Turner, Rev. Ed. Williams, Sylvester Williams and Mrs. F. C. Wilson are black citizens of the City of Mobile, Alabama, over the age of 21 years.

B. Defendants, Gary A. Greenough, Robert B. Doyle, Jr., and Lambert C. Mims are each over the age of 21 years and are bona fide citizens of Mobile, Alabama. The defendants are the duly elected City Commissioners of Mobile.

IV.

Nature of Claim

A. The Mobile City Commission is the governing body of the City of Mobile, holding the legislative power granted to cities. In addition, its members perform certain administrative and executive functions.

B. The Mobile City Commission is organized under Act

163, Reg. Sess. 1911, as amended.

C. The three (3) commissioners on the City Commission are elected at large to numbered places.

D. The City of Mobile has a total population of 190,026, of whom 35.4% or 67,356 are black. Certain areas of Mobile are almost totally devoid of blacks, while others are virtually all black. Segregated housing patterns have resulted in concentrations of black voting power.

E. The present system of electing city commissioners discriminates against black residents of Mobile in that their concentrated voting strength is diluted and canceled out by the white majority in the city as a whole.

V.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the unconstitutional election system described herein.

WHEREFORE, plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiffs and the class they represent a declaratory judgment that the election system complained of herein violates the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. Secs. 1973,

1983 and 1985(3).

2. Grant plaintiffs and the class they represent an order enjoining the defendants, their agents, successors, attorneys and those acting in concert with them and at their discretion from holding, supervising, or certifying the results of any election for the Mobile City Commission under the present at-large election system and from failing to adopt a plan of city government using single-member districts.

3. Award plaintiffs and the class they represent their costs in this action, including an award of reasonable attorneys' fees.

4. Grant such other and further equitable relief as the Court may deem just and proper.

CRAWFORD, BLACKSHER &
KENNEDY
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

By: /s/ J. U. Blacksher
J. U. BLACKSHER

EDWARD STILL, ESQ.
321 Frank Nelson Building
Birmingham, Alabama 35203

Attorneys for Plaintiffs

[caption omitted in printing]

MOTION TO DISMISS

Comes now each defendant in the above-styled cause, jointly and severally, and moves the court to dismiss this cause upon the following grounds:

1. The complaint fails to state a claim upon which relief can be granted.

2. Insofar as this action is against the City of Mobile and is based upon 42 U.S.C. §1983, the complaint fails to state a claim upon which relief can be granted.

3. Insofar as this action is based upon 42 U.S.C. §1985 (3), the complaint fails to state a claim upon which relief can be granted.

4. Insofar as this action is based upon 42 U.S.C. §1973, the complaint fails to state a claim upon which relief can be granted since the complaint affirmatively shows that no plaintiff is among those empowered to bring enforcement actions under any provision of the Voting Rights Act of 1965 other than Section 5 thereof.

5. Insofar as this action is jurisdictionally based upon 28 U.S.C. §1331, there is want of subject matter jurisdiction in this Court since it appears to a legal certainty that the claim of each class member is in reality for less than the requisite jurisdictional amount in controversy.

6. Insofar as this action is against the City of Mobile and is based upon a remedy inferred from the Constitution, cognizable under 28 U.S.C. §1331, the complaint fails to state a claim upon which relief can be granted.

7. Insofar as this action is brought under 42 U.S.C. §1973, the complaint fails to state a claim upon which relief can be granted, since that statute creates no new right the violation of which is actionable, but instead only a new remedy to implement previously held rights.

/s/ Charles B. Arendall, Jr.
Charles B. Arendall, Jr.
30th Floor - First National Bank Building
Mobile, Alabama 36602
Attorney for Defendants

OF COUNSEL:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

/s/ S. R. Sheppard
S. R. Sheppard
Attorney for Defendants

OF COUNSEL:

LEGAL DEPARTMENT OF THE CITY OF MOBILE

[Certificate omitted in printing]

[caption omitted in printing]

MOTION TO STRIKE

Comes now each defendant in the above-styled cause, jointly and severally, and moves the Court to strike from Plaintiffs' complaint the following prayers for relief:

1. The injunctive relief prayed for in Paragraph V-2 of the complaint, in which Plaintiffs seek to enjoin defendants "from failing to adopt a plan of city government using single-member districts".

2. The demand for "an award of reasonable attorneys' fees", contained in Paragraph V-3 of the complaint.

/s/ Charles B. Arendall, Jr.
Charles B. Arendall, Jr.
30th Floor - First National Bank Building
Mobile, Alabama 36602
Attorney for Defendants

OF COUNSEL:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

/s/ S. R. Sheppard
S. R. Sheppard
Attorney for Defendants

OF COUNSEL:

LEGAL DEPARTMENT OF THE CITY OF MOBILE

[Certificate omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

WILEY L. BOLDEN, et al., Plaintiffs,	)	
V.	)	CIVIL ACTION No. 75-297-P
CITY OF MOBILE, ALABAMA, et al., Defendants.	)	

ORDER ON MOTION TO DISMISS

The plaintiffs, black citizens of the City of Mobile, seek to bring this action as a class action on behalf of themselves and on behalf of all other black persons similarly situated, pursuant to Rule 23(a) and Rule 23(b)(2), Federal Rules of Civil Procedure.

It is alleged that they, and all other such persons, have been, are being, and will be adversely affected by the defendants' practices complained of, to wit, they are and continue to be deprived of equal protection of the laws because of the election at large system of the City Commissioners to numbered places. It is claimed this discriminates against black residents of Mobile in that their concentrated voting strength is "diluted and cancelled out by

the white majority."

The plaintiffs seek the following relief: (1) a declaratory judgment that the election system violates the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§1973, 1983, and 1985(3); (2) issue an order enjoining the defendants, their agents, etc. from holding, supervising, or certifying the results of any election for the Mobile City Commission under the present at-large election system, and from failing to adopt a plan of City government using single member districts: (3) award the plaintiffs costs and a reasonable attorney's fee; (4) grant such other and further equitable relief as the court may deem just and proper.

Jurisdiction is invoked pursuant to 28 U.S.C. §§1331 and 1343.

The motion to dismiss the City of Mobile as a party defendant answerable under Section 1983 is well taken and should be granted. It is clear that a municipal corporation is not a "person" within the meaning of 42 U.S.C. §1983, *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), 37 L.Ed.2d 109, 93 S. Ct. 2222; *Monroe v. Pape*, 365 U.S. 167 (1961), 5 L.Ed.2d 492, 81 S. Ct. 473.

The motion to dismiss the City of Mobile under §1985(3) is due to be granted. The City of Mobile is not a "person" within the meaning of that section. *Bosely v. City of Euclid*, 496 F.2d 193 (6th Cir. 1974); *Mack v. Lewis*, 298 F. Supp. 1351 (D.C. Ga. 1969).

Furthermore, a claim against any defendant is not stated pursuant to that section.

In *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 214 (1975), the Fifth Circuit summarized a 1985(3) cause of action as follows:

> "This requires that the complaint show that there was a conspiracy; that such a conspiracy be for the purpose of depriving an individual of the equal protection of the laws; that the co-conspirators acted in furtherance of their conspiracy, and that the plaintiff was injured in his person or property or actually deprived of a citizen's right or privilege. Second, as the Supreme Court noted in Griffin: [T]he language of [of 1985(3)] requiring intent to deprive of equal protection or equal privileges, and immunities means that there must be some racial or perhaps otherwise class based invidiously discriminatory animus behind the conspirators' action."[1]

Plaintiffs have not set out sufficient allegations of a conspiracy to meet this test. They only alleged that the election system discriminates against them. [Complaint IV-E] Therefore, insofar as the action is based on 42 U.S.C. §1985(3), the complaint fails to state a cause of action and the motion to dismiss this cause of action as to all defendants in the complaint is well taken and is GRANTED.

The defendants' motion to dismiss the cause of action under the Voting Rights Act of 1965, 42 U.S.C. §1973 is not well taken and the motion is DENIED as to all defendants.[2]

Therefore, under 28 U.S.C. §1343(4), this court has jurisdiction of all defendants inciuding the City of Mobile as to this cause of action.

Since this court has jurisdiction under §1343(4), it is unnecessary to discuss the jurisdictional issue under 28

[1]See Griffin v. Breckenridge, 403 U.S. 88.

[2]See the amendment to the Act approved August 6, 1975: "Section 401. Section 3 of the Voting Rights Act of 1965 is amended by striking out 'Attorney General' the first three times it appears and inserting in lieu thereof the following 'Attorney General or an aggrieved person." U. S. Code Congressional and Administrative News, P.L. 94-73, 89 Stat. 404.

U.S.C. §1331.[3] Therefore, motion of defendants as to the cause of action under §1973 and the attack of the jurisdiction as to §1343(4) is not well taken and is hereby DENIED.

The defendants' motion to strike attorneys' fees and the injunctive relief prayed for in paragraph V-2 is DENIED.[4]

Done, this the 18th day of November, 1975.

/s/ Virgil Pittman
UNITED STATES DISTRICT
JUDGE

---

[3]The complaint alleges an amount in controversy of $10,000 or more, but briefs claim the jurisdictional amount is based on a $10,000 loss to defendants rather than to the plaintiffs. For a good discussion of the right to proceed under §1331 with less than the $10,000 jurisdictional amount, see *Cortright v. Resor*, 325 F. Supp. 797 (D.C. N.Y. 1971) at p. 808. The case was reversed for other reasons.

[4]See the amendment to the Act approved August 6, 1975. "Section 402. Section 14 of the Voting Rights Act of 1965 is amended by adding at the end thereof the following new subsection: (e) In any action or proceeding to enforce the guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of these costs." *Supra*, footnote 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILEY L. BOLDEN, *et. al.*,	:	CIVIL ACTION NO: 75-297-P
Plaintiffs,	:	
vs.	:	
CITY OF MOBILE, *et. al.*,	:	
Defendants.	:	

ANSWER

Come now the defendants, the City of Mobile, Alabama, and Gary A. Greenough, Robert B. Doyle, Jr., and Lambert C. Mims, individually and in their official capacities as Mobile City Commissioners, and, in answer to the named plaintiffs' complaint, say:

FIRST DEFENSE

I. Jurisdiction

Defendants admit that this Court has subject matter jurisdiction of this cause insofar as it is a claim against the

said commissioners under 42 U.S.C. §1983, jurisdictionally premised upon 28 U.S.C. §1343. In all other respects the allegations of Section I of the complaint are denied.

II. Class Action

1. Defendants admit that the named plaintiffs purport to represent a class composed of all black citizens of the City of Mobile, but deny that this action may properly be maintained as a class action on behalf of such persons.

2. Defendants deny that blacks as such are adversely affected by any practices of defendants.

3. Defendants deny that blacks are, or continue to be, deprived of the equal protection of the law in the City of Mobile.

4. Defendants admit that the joinder of all members of the purported class would be impracticable.

5. Defendants deny that the named plaintiffs may properly represent all black citizens of the City of Mobile. Defendants say, on the contrary, that the political ideas of the named plaintiffs with respect to the issue in this case are not shared by all blacks in the community; that there is disparity among black citizens, as there is among white citizens, with respect to the form of city government which is desired.

6. Defendants deny that they have acted or refused to act on grounds generally applicable to the purported class.

7. Defendants deny that injunctive or declaratory relief with respect to the purported class is proper.

8. Except as herein expressly admitted, defendants deny all allegations of Section II of the complaint.

III. Parties

Defendants admit the allegations of Section III of the complaint.

IV. Nature of Claim

1. Defendants admit that the Mobile City Commission is the governing body of the City of Mobile by virtue of, but only to the extent allowed by, statutes enacted from time to time by the Legislature of the State of Alabama. Pursuant to such statutes, the commission performs certain executive and administrative functions and holds limited legislative powers. Plenary legislative authority over the affairs of the city is vested in the Legislature of the State of Alabama. The three city commissioners are elected at large to numbered places, each of which has different legally specified functions. Certain sections of the city are predominantly white and others are predominantly black, but such sections are scattered over the city and there is no geographical area of substantial size in which both whites and blacks do not reside.

2. Except as herein expressly admitted, defendants deny all allegations of Section IV of the complaint.

V. Relief

Defendants deny the allegations of Section V of the complaint and deny that the relief sought by the named plaintiffs is necessary or proper.

SECOND DEFENSE

All aspects of the government of the City of Mobile are subject to determination by the Legislature of the State of Alabama. In the exercise of its discretion, the Legislature has provided that the city have a City Commission form of government, as distinguished from a Mayor-Council or Mayor-Aldermen or City Manager form, and has specified the number of commissioners and the method to be used in electing them. Under our federal constitutional system, the determination of such matters is committed to state government and its components for resolution. The system chosen by the Legislature does not unconstitutionally deprive any of the many identifiable segments of the community from equal access to the electoral process, or discriminate for or against any such segment, and the continued existence of such system should be permitted by the judicial branch of the United States government.

THIRD DEFENSE

The choice of the form of city government is a political issue committed under our federal system to the states for resolution and, in the case of the City of Mobile, the issue has been resolved by the Legislature of the State of Alabama in favor of a City Commission form of government elected at large. If the named plaintiffs, or any other black citizens of the City, desire to change Mobile's form of government, they should seek appropriate action by the Legislature, which has authority over such matters and in which blacks from Mobile are currently serving as elected members.

FOURTH DEFENSE

The relief sought by plaintiffs in this cause ought not to be granted because it would effect a deprivation of due process and equal protection of law, since if each commissioner were required to be elected from a single-member district, without a change in the statutory duties of the respective city commissioners, each commissioner, managing a particular function of city government (*e.g.*, finance), would be directly responsible only to one of three geographical districts of the city. The result would be that the remaining portions of the city would have no vote at all either for or against such commissioner, who would execute policies of government without responsibility to two-thirds of those governed.

FIFTH DEFENSE

The relief sought by plaintiffs in this cause ought not to be granted because, in order for any court-ordered single-member district plan to be imposed that would avoid the existence of a city government without electoral responsibility and consequent deprivation of due process and equal protection of law, it would be necessary to change the form of city government validly enacted by the Legislature of Alabama from a city commission form to some other form of government. The choice of a form of city government is a function which our federal constitution entrusts to state government and its components, and the imposition of a different form of city government by a United States Court would violate established constitutional principles of comity and federalism.

/s/ C.B. Arendall, Jr.
C.B. Arendall, Jr.
30th Floor, First National Bank Bldg.
Mobile, Alabama 36602
Attorney for Defendants

OF COUNSEL:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON

/s/ S.R. Sheppard
S.R. Sheppard

OF COUNSEL:

LEGAL DEPARTMENT OF THE CITY OF MOBILE

[Certificate omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

WILEY L. BOLDEN, ET AL,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	CIVIL ACTION NO. 75-297 P
CITY OF MOBILE, ALABAMA,ET AL,	:	
	:	
Defendants.	:	

ORDER

The plaintiffs have filed a motion for an order certifying that they may maintain this action as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

The Court having considered the motion, oral argument and briefs of the parties certifies that the plaintiffs may maintain this action as a class action.

The plaintiff class for the purposes of injunctive relief under Rule 23(b)(2) F.R. Civ.P. is defined by the Court as all black persons who are now citizens of the City of Mobile, Alabama.

The Court finds that this class action complies with the requirements of Rule 23(a) and (b)(2) F.R.Civ.P. and that the named plaintiffs have the standing to raise the issues for

the purpose of injunctive relief.

DONE at Mobile, Alabama, this 19th day of January, 1976.

/s/ Virgil Pittman
UNITED STATES DISTRICT JUDGE

[caption omitted in printing]

ORDER

The United States Supreme Court having granted review of this lawsuit on October 2, 1978, and for the reasons stated in this court's Order of April 7, 1977 (the findings and conclusions of which are incorporated herein by reference),

It is ORDERED, ADJUDGED, and DECREED that pursuant to the last paragraph of this court's order of May 31, 1978, which provided for a stay of the mayor-council election ordered therein in the event the Supreme Court granted review, the election ordered for November 21, 1978, is hereby STAYED pending further orders of the United States Supreme Court.

Done, this the 3rd day of October, 1978.

/s/ Virgil Pittman
Virgil Pittman
by W.B. Hand per instruction
UNITED STATES DISTRICT JUDGE

U. S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
3rd DAY OF OCTOBER 1978
MINUTE ENTRY NO.
WILLIAM J. O'CONNOR, CLERK
BY-

Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 16, 1978

J. U. Blacksher, Esquire
1407 Davis Avenue
Mobile, Alabama 36603

RE: City of Mobile, Alabama, et al v.
Wiley L. Bolden, et al., No. 77-1844
(A-315)

Dear Sir:

The Court today entered the following order in the above-entitled case:

"The application of appellees to vacate the order issued by the United States District Court for the Southern District of Alabama on October 3, 1978, presented to Mr. Justice Powell and by him referred to the Court, is denied."

Very truly yours,

MICHAEL RODAK, JR., Clerk
by
Francis J. Lorson
Deputy Clerk

[cc: list omitted]

blacks were disinfranchised before 1950.

MR. BLACKSHER:

All right, sir. There is some question in this case whether there was any discriminatory racial motive behind the 1911 Act.

THE COURT:

All right. Go ahead, Mr. Blacksher.

MR. BLACKSHER:

We call Dr. McLaurin.

DR. MELTON McLAURIN

the witness, called on behalf of the Plaintiffs, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q May it please the Court, this is Dr. Melton A. McLaurin. Dr. McLaurin was born July 11, 1941. His place of birth was Fayetteville, North Carolina. His present address is 808 Deerfield Court, Mobile. He is married.

His formal education includes a Bachelor's Degree

and I have taught non-credit courses in the history of Mobile. Those are the basic courses that I teach.

Q Where did you teach these non-credit courses on the history of Mobile?

A At the University of South Alabama continuing education division.

Q Have you ever testified in Court as an expert witness, Dr. McLaurin?

A No, I haven't.

Q Have you ever testified as a witness in any role in Court?

A No. I haven't.

MR. BLACKSHER:

Your Honor, on the basis of the testimony of the witness and the evidence in his curriculum vitae, which we have not completely summarized, we move that Dr. McLaurin be qualified as an expert witness in the field of Southern History, generally, and in the history of Mobile, Alabama?

THE COURT:

All right. Go ahead.

MR. BLACKSHER:

Q Dr. McLaurin, what was the beginning of black political activity in Mobile, Alabama?

A Blacks became politically active in Mobile with

the beginning of radical reconstruction in the spring of 1867 and that was the beginning of their political activity.

Q How did they become active?

MR. ARENDALL:

Objection, irrelevant.

THE COURT:

I will let him show it. Overruled.

A They became politically active in almost all areas. They held a convention immediately after the passage of the Reconstruction Acts and gathered themselves together to decide what activities to engage in. From that point forward, which was in May of '67, and were active in almost all fields of political endeavor.

Q What about black citizens in Mobile, particularly? Were they any more active?

A Well, Mobile was the major urban center in the State and blacks congregated here at the end of the war and held sort of a black political convention here -- not at the end of the war, but at the beginning of radical reconstruction, yes. In a way, Mobile was a center for black political activity.

Q Were black Mobilians active in any way in forming policy?

A Blacks were represented at the convention in 1867

which wrote the constitution in 1868 and actively participated in that convention.

Q Do you recall the names of those black delegates?

THE COURT:

Is that detail necessary? You know, you are going over something that is generally knowledgeable. It is all right to build your pattern, but cut down on some of it unless the name has some particular significance.

MR. BLACKSHER:

We will move along, your Honor.

Q I don't want to say it was generally knowledgeable. Most of it was new to me.

THE COURT:

Well, go ahead.

MR. BLACKSHER:

Q What about from the period 1868 or 1867 forward, were blacks politically active in Mobile then?

A Blacks were active in Mobile politics and in the State, in general, up until 1901 and they were active throughout that period.

Q What was the effect of the 1893 Sayer election law, and what was that?

MR. ARENDALL:

Objection, irrelevant.

THE COURT:

I will let him testify.

A The Sayer election law was introduced primarily by the conservative elements of the Democratic party in an intent to cut down on the populist vote. It was a direct result of a challenge to the Democratic party by the populist and it was an effort to disinfranchise voters in lower socio-economic groups, including blacks, to some extent.

Q Did the Sayer law disinfranchise all black voters?

A No.

Q You say up until 1901. Would you describe what happened then?

A Nineteen hundred and one, the new constitution was adopted and one of the major purposes was for -- for its adoption was disinfranchisement of black voters. That was primarily it. And with the adoption of that constitution, blacks were effectively moved from the political process from the State of Alabama and the City of Mobile.

Q Was black disinfranchisement the principal purpose of the 1901 Alabama Constitution?

A I would say black disinfranchisement was the principal purpose for the constitutional convention and, in addition to that, it was the major way in which the

disinfranchisement was sold.

The idea that the convention was going to be held primarily to disinfranchise blacks and to guarantee white supremacy was the way the calling of the convention was sold to the public and it was the way the product of the constitution was sold to the public.

Q What were the reasons for the politicians then wanting to disinfranchise black voters?

A The movement probably gained its largest impact from the idea that black votes were corrupt and blacks causes corruption in the political activity and, therefore, to disinfranchise blacks would be a political reform by removing corruption from politics.

Now, that is the reason that is generally stated. There are other motives involved.

Q What was the so called reform movement that was going on, at that time?

A Well, this is generally called the progressive movement by historians and in the south the progressive movement included disinfranchisement because the black voting patterns were shown as corrupting patterns. Various whites sought the black vote.

As a matter of fact, it would be manipulated in the black belt counties to assure this passage.

Q Was disinfranchisement, as carried out through the 1901 constitution, resisted by black citizens?

A Oh, yes.

Q What about black Mobilians?

A Oh, yes. Black Mobilians, as a matter of fact, took the lead, they and blacks in Birmingham, in resisting disinfranchisement.

Q What were the devices employed by the 1901 constitution to disinfranchise blacks?

A There were a number of them. The basic one was literacy and property qualifications, residential qualifications, but the literacy requirement was the basic one.

Q What involvement in the 1901 constitutional convention was there by white Mobile politicians?

A Well, I think one can say, by and large, the progressive community in Mobile was considered, at that time by historians, was to be in the progressive democratic camp, which was quite active. The register, for example, was one of the leading newspapers calling for a constitutional convention. Several prominent politicians who would be considered progressives either supported the convention or participated in it.

Q Who were the delegates from Mobile to that convention?

A Well, the delegates to the convention were Harry

Pillans and a gentleman named Brooks, I believe, are the two that come to mind.

Q Did these Mobilians support the disinfranchisement of the black voters?

A Yes.

Q Do you have with you correspondence that was originated by Mr. Harry Pillans concerning his intention as a member of the 1901 constitutional convention?

A Yes. And I think generally they show a progressive attitude toward disinfranchisement; that is, disinfranchisement was a reform, a part of the general reform movement.

Q What brought about the adoption of the current commission form of city government in 1911?

A Well, I would say it was again considered a progressive reform. The idea of having a more efficient government, and particularly a government that was more business like and one that was less amenable to what the advocates of the commission form of government would have considered political corruption. These were the basic reasons, I think, for the support for the commission form of government.

It was also a part of the general progressive movement in the United States. Many other cities had already adopted the commission form of government, both nationally

and in Alabama.

Q Was racial discrimination, per se, a motivating factor in the passage of Act 281 of 1911 which created the Mobile City Commission?

A I would say that racial considerations, per se, were not a part of the motivation, for two reasons; the basic one being that the blacks had already been disinfranchised by the 1901 constitution and its effect upon the blacks of the State and of Mobile and -- but I think it is also true that the proponents of the commission form of government were very much aware of the impact of the changes in the electoral process and this is one of the things they wanted. They wanted to get away from what they considered ward politics and they would have been aware that such a movement would have diminished the impact of any voting by blacks in Mobile if there had been such voting in the future, but I do not see race, per se, as a reason for the 1911 City Commission. I would have to say no to that question.

Q What specific connection do you see between the 1901 constitutional convention and Act 281 in 1911?

A Well, the most obvious connection is that blacks in Mobile were totally unable to register any opinion, any voice in the development of the form of government, which was adopted in 1911, and continues to exist. That is the most

obvious connection.

The other connection would be this idea of the Commission form of government being a part of the general reform package, so to speak, in that in Alabama and in the south in general, at that time, and the connection between general reform and the idea of eliminating the franchise as a part of that general reform, those are the two possible connections.

Q What about in terms of black politicians?

A Well, many of the progressive politicians who had supported the constitution of 1901 here in Mobile also supported the Commission form of government. It was that kind of personal connection and Mr. Pillans would be, again, a very good example, since he was both a delegate at the 1901 constitution and was a member of the first City Commission.

Q What about the last mayor?

A Well, Mr. Lyons's position?

Q That was Pat Lyons?

A Yes. He was favorable to the 1901 constitutional convention and he also would have, after some thoughts, supported the 1911 movement and did serve on the first Commission as well.

Q What black political activity was there in Mobile right after 1911?

A None, approximately none. And, of course, that would be true, too, earlier, until you get way up until -- the modern period, the second World War.

Q When did black political activity again become significant in Mobile?

A Political activity, per se, not until after the decision in Smith versus Alright, which allowed blacks to take part in white primaries, what has been previously been all white primaries. 1944 would be the date.

Q The Clerk is handing you a document which has been marked as Plaintiffs' Exhibit number 2.

Would you identify that, please?

A Yes. That is an article by myself.

Q Would you read the title of the article?

A Mobile Blacks and World War II: The Development of a Political Consciousness.

Q Would you briefly tell the Court the subject of that article?

A Well, I think it would be fair to say that the article simply recounts the beginning of political activity by blacks in Mobile as a result of the second World War, the impact of returning veterans, black veterans, who had fought in the second World War and the ideas of equality and so forth and determined to obtain them in their home town when they came back

in trying to get the right to vote in 1944, which they were denied, and their appeals to the Democratic party and the Department of Justice and, finally, the opening up of the Democratic party to black participation and then white efforts led by Gessner McCorvey, who was chairman of the State Democratic Executive Committee and others to introduce legislative methods of suppressing black votes and then black challenges to that, particularly the Davis versus Schnell case which led to the declaration that the Boswell amendment, which was the disinfranchisement amendment was declared unconstitutional. That is briefly what the article covers.

Q Does it mention Mr. Langan's arrival on the scene as a friend of black interests?

A Yes, sir. It does. Mr. Joseph Langan.

Q And the article ends off at what point in time?

A It ends in 1950 with the legislative races of 1950.

Q Where was that article published, Dr. McLaurin?

A It was published in the proceedings of the Gulf Coast Histories and Humanities Conference, 1973.

Q There is one set of figures in that article that I would like for you to call to the Court's attention. There is a registration figure, I believe, for the year of 1946?

A That is correct. The registration figures, at that time, were two hundred and seventy-five registered blacks and

MR. ARENDALL:

Q How many people were on the aldermanic council unit that governed Mobile, at that time?

A I could not give you an exact figure. I would have to try to total up the wards and multiply.

Q A mere approximation?

A Approximately sixteen to eighteen.

Q Now, I will ask you whether or not a study of the newspaper articles of that time and the quotations of the comments made by persons such as Mayor Pat J. Lyons demonstrates that the change to the City Commission form was sold on the basis of business and other considerations completely unrelated to race?

A I would agree that the basic approach in the campaign to change the form of government of the City of Mobile would be an appeal to what would be called progressive economic motivation, the idea of moving to a more business like form of government.

Q And this movement, in Mobile, had its counter part all over the United States, at that time, did it not?

A And before that time.

Q In areas where there were no blacks or substantially none?

A Yes. That would be true.

Q Desmoines, that is one?

A Yes.

Q Dayton, that is another?

A Yes.

Q And it was not, in these other places, either, motivated by racial considerations, was it?

A No.

MR. ARENDALL:

No further questions.

REDIRECT EXAMINATION

BY MR. BLACKSHER:

Q Dr. McLaurin, I believe you said that one of the meaningful factors of the 1901 constitutional convention was to disinfranchise poor whites.

Are you saying that that was one of the primary purposes of that constitution?

A No. I am not saying that. I am saying the primary purpose of the constitutional convention was to disinfranchise blacks and that, as a secondary purpose, there was a move to disinfranchise poor whites and there were members of the constitutional convention who would have disinfranchised every one who didn't make at least fifty thousand dollars a year.

Whom will you have next?

MR. BLACKSHER:

Dr. Cort Schlichting.

DR. CORT B. SCHLICHTING

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. STILL:

Q May it please the Court, this is Cort Burk Schlichting. He is thirty-four years of age. He now lives at 301 Vanderbilt Drive in the City of Mobile.

He is married. Education includes a PHD from L.S.U. He has lived in Mobile County for the last five years and he is now employed as a professor of economics; is that correct?

A Associate.

Q Associate professor of economics at Springhill College. I would ask the Clerk to hand Dr. Schlichting Exhibit number 8.

Would you look at Exhibit 8, please, doctor, and

Did you talk with Mr. Parker about the inclusion of the two small areas that were periodically annexed and de-annexed?

A Very briefly, yes. We had to face that problem.

Q All right. Now, did you talk with them about what method to use or what method he was going to use to handle the data regarding those two small areas?

A Yes.

Q Now, considering the annexation, the synthetic wards that were done the way in which Mr. Parker computed the mean income computation and the use of the percentage of each race over the age of eighteen, rather than the percentage of each race which were actually registered to vote, what is your opinion as to the possible negative effect this had on the validity of the data?

A I felt that we did the best possible job we could do statistically to obtain the most accurate data we could get. All statisticians, all statistical data is going to have some error in it and given that caveat we attempted to gather the data as best we could and to have it as representative as possible.

Q All right. Now, doctor, what is the function of regression analysis?

A Regression analysis is a statistical technique

frequently called regression correlation analysis, where you attempt to see if there is an association between a dependent variable and various independent variables.

We attempt to explain the variations in the dependent variable, that is the movement in the dependent variables by movement in the independent variables.

Q In this particular case we are talking about what was the independent variable?

A The independent variables, there were two of them, where the income, per capita, mean income per capita, was one of the independent variables and the other one was the percent of race in a particular ward.

Q And what was the dependent variable?

A The dependent variable was a percent that a particular issue or a particular candidate obtained in a particular race, percent of the total vote in that ward.

Q Are there any problems presented by using two independent variables rather than one in the same analysis?

A No. You want to include probably more than one variable, because what you are attempting to do is to find which variable, which thing is effecting the dependent variable. So, when you throw in two or more and then by using regression correlation analysis you can find out which one is the most powerful variable.

Q All right. Mr. Clerk, would you hand the witness Exhibit number 9, please?

Dr. Schlichting, please look at Exhibit 9 and tell me whether you have ever seen it before?

A I have.

Q What is it?

A It is Dr. Voyles's desertation.

Q What is the title?

A The title of it is "An Analysis of Mobile Voting Patterns, 1948 to 1970".

Q Have you read the entire thing?

A No, I have not.

Q Have you read parts of it?

A Yes.

Q What parts have you read?

A I have read the methodological parts, the portions where he deals with the statistics that he had gathered and used in his desertation.

Q Does Dr. Voyles use regression analysis?

A In a manner of speaking, yes.

Q What type of regression analysis does he use?

A His statistical analysis is called Pearson's Product Moment Method. It is one of two main kinds of ways that we can look at variables and see which ones are effecting

the dependent variable.

Q Did we use the same method in ours?

A No. We did not.

Q What did we use?

A We used what is called least squares method.

Q In terms of Dr. Voyles's methodology, would you compare that with ours and tell us what the major differences were, if any?

A There are no real major differences. The differences statistically, the starting point of where you relate the various variable values to what base you relate the various variable values, but in point of fact, they give you the same answer.

Q Did Dr. Voyles trace income and race data as we did?

A He did.

Q Was the general format of that data, as far as you can tell from the desertation, pretty much the same as ours?

A It seemed to be quite similar. In fact, his format is what we used or attempted to use.

Q All right. Now, you have explained that the regression analysis, using the least squares method which we used can handle two or more independent variables?

A Correct.

Q Is the Pearson's R regression analysis technique capable of handling more than one independent variable at the time?

A Yes, sir, basically.

Q As far as you can tell from Dr. Voyles's thesis, did he do that, did he use more than one at a time?

A No. I think not. I think he used race and compared it to the percent of vote that a candidate got and then he compared income, if I recall correctly.

MR. STILL:

Your Honor, we move the introduction of Exhibit number 9.

THE COURT:

All right.

(Plaintiffs' Exhibit number 9 received and marked, in evidence)

MR. STILL:

Q Would the Clerk please hand the witness Exhibits 10 through 53.

Dr. Schlichting, have you had a chance to examine the computer print-outs which begin at Exhibit 10 and go through Exhibit 52?

A Yes.

Q Would you tell the Court what they are as a group,

similar to that giving dates and names?

A Yes, they are.

Q What is the next thing on the computer print out?

A The original data, the table of the original data.

Q And how is that data arranged?

A It is in three columns. The first column is the percent of the ward population that is black, over eighteen. The second column is mean income per capita and the third column -- those are both independent variables -- and the third column is the dependent variable. That is the percent of vote received in this particular case by Mr. Goode.

Q All right. Once that data .....

THE COURT:

Let me ask you a question. Do you mean the dependent variable is dependent on the independent variable?

A That is correct. That is what we are trying to postulate.

THE COURT:

You are saying there is a causal connection?

A No, sir, not a causal connection. There is an influence, we think. We are going to test for an influence at work.

We can't -- statistics say there is a cause and effect. We don't have that background.

THE COURT:

All right. To use your terminology it is less than causal?

A Yes. It is influential. At least, that is what we are testing.

MR. STILL:

Now, is that all the data, that is raw data that is fed into the computer?

A That is correct, other than control cards that tell the computer what to do and this sort of thing.

Q All right. Then is the program fed in?

A Yes.

Q All right. Now, is this a program that was written specifically for this case or is it a standard program?

A This is a standard program that was supplied by IBM at Springhill, one of many programs. I adjusted it to print up more than what they supplied, but basically that is it.

Q What other sort of things does Springhill use this for?

A I don't know that Springhill, per se, that is the administration has used it, but I have used it in a number of different things. I have used it in analysis of factors probably affecting bank credit and I have used it in several

reported in his desertation and for various multiple correlation coefficients that we found when we ran all of these computer print-outs.

Q All right. For the top portion of the top sheet you have "Voyles Pearson's R"?

A Yes.

Q And you have a set of dates and under each date you have income and race?

A Correct.

Q Now, is that the Pearson's R for income and the Pearson's R for race; is that what it is?

A Yes.

Q For each one of the elections that we are talking about?

A Correct.

Q Now, under regression, you have only listed a coefficient. Is that the coefficient of race or income or of both?

A That is the coefficient of race, unless otherwise specified.

THE COURT:

Hold up. The Reporter has to change his tape.

(OFF THE RECORD)

MR. STILL:

Would you repeat the last sentence or so that you said about the stars?

A All of our coefficients as shown in the middle of the first page and on down refer to race as the factor that entered first in the regression analyses unless there is a star by it, in which case, income was the most significant variable.

Q All right.

MR. ARENDALL:

Where is a star?

A There are no stars on the first page.

MR. ARENDALL:

I see.

THE COURT:

I think you should make a note at the top of that table that it is race unless indicated with a star.

MR. STILL:

Would you so indicate, please, next to the regression?

A Yes.

MR. STILL:

Your Honor, I am through looking at my copy of it. If you would like to look at it, we will be referring to it some more.

THE COURT:

All right.

MR. STILL:

Now, Dr. Schlichting, is there a point in which the multiple correlation coefficient is considered to be significant or not significant in regard to the type of analyses we have been running here?

A Well, as Dr. Voyles shows in his desertation, there is a table in here that lists the ranges within which these are values the regression coefficients are significant or not significant. Basically, anything above say fifty -- point five, point six, will begin to give you significant relationships.

Q All right. Now, would that also include above if we want to call that a negative point six?

A Yes. The sign is ignored.

Q All right. Now, if there was a correlation between two variables and the multiple correlation coefficient came out to be one point zero with a plus sign in front of it, what would that indicate as to the relationship between the two variables?

A It would indicate that there is a perfect relationship between the two variables, that the independent variable can perfectly explain the dependent variable.

Q If the multiple correlation coefficient came out as

along racial lines, what is the cast of this?

MR. STILL:

This is to show votes do polarize.

THE COURT:

I think we recognize in most elections, particularly where blacks and whites are running against each other that that is the case?

MR. STILL:

We would point out to your Honor we have only two or three instances in the twenty year period in which blacks have run for the City Commission and these elections we are talking about are, in most cases, whites versus whites so that we can show that there is a racial polarization.

THE COURT:

Yes. Certainly we take common knowledge of that. When Mr. Langan ran he became identified with black voters and there was a certain polarization there.

What I am saying, is when race becomes identified with a certain candidate, there is a tendency for polarization.

MR. BLACKSHER:

Judge, I think we have felt that we have that common knowledge, but what we are trying to do is verify that to the extent that we can.

THE COURT:

THE COURT:

All right.

(Plaintiffs' Exhibits 10 through 54, inclusive, was received and marked, in evidence.)

MR. STILL:

Q Dr. Schlichting, that's all the questions I have for you, at this time. Please answer Mr. Arendall's questions.

THE COURT:

You may proceed.

CROSS EXAMINATION

BY MR. ARENDALL:

Q Dr. Schlichting, without ever putting one finger on a computer I will ask you whether or not you would have figured that in the days of school dessegregation issues, adoption of the Civil Rights Act, the voting rights act that there would have been some tendency on the part of blacks to vote one way and the whites to vote another.

MR. STILL:

Objection, your Honor. The witness is a statistician and not a political scientist or a politician.

THE COURT:

Well, if he reads the newspapers and follows current

events, I think he can give some opinion, not as an expert, but as a layman.

I think it is almost a matter of common knowledge. Go ahead. As Mr. Blacksher has said, you can give statistical proof to recognized facts. Go ahead.

A I would have to say yes, certainly.

MR. ARENDALL:

Q Now, as far as the statistical proof of this thing, let's take a look at it, if you will.

First, would you tell us what "R" square is?

A "R" square is multiple coefficient of determination.

Q As related to the regression analysis which you did, tell us how it operates and what it's perimeters are insofar as determining whether or not your regressiona analysis shows anything worth looking at, insofar as the matters concerning whether race or economics had a greater impact on the election?

A Regression analysis are also interesting. In looking at -- as far as your particular question -- "R" square is merely the square of the coefficient of correlation that we have been talking about. The reason we used "R" rather than "R" square is because Dr. Voyles had used "R" rather than "R" square.

"R" is on a base from zero to one and allows us to talk about a scale like -- the power of a variable in explaining

wards?

MR. BLACKSHER:

I think that is what they showed.

THE COURT:

All right.

MR. BLACKSHER:

I am not going to stipulate to every one of them. It is our impression that they didn't carry many, if any.

MR. ARENDALL:

Q So, Dr. Schlichting, isn't it fair to say that of the three black candidates in 1973, if they tended to get any votes, they tended to get them from blacks, but didn't get any appreciably?

A My understanding was that these were minor candidates, yes.

Q Exhibit 50, 1973 City Commission runoff, Greenough, using Voyles's data. What is the "R" square?

A Point three five one eight.

Q Exhibit 51, 1973 change of government referendum?

A Point six four four nine.

Q I believe that you told us that in the 1963 government change that you found no substantial relationship between vote and race, did you not?

A I can go back and check that. I don't recall having

except with respect to the Langan races in 1965 and 1969, your regression analysis doesn't attempt to show anything statistically worth while except with respect to those races?

A No, sir. What about the Outlaw one for '65; that was point seven seven, and the Luscher one, that was point seven eight?

Q That was a 1965 race between Mr. George McNally and Mr. Outlaw, and Mr. McNally had been in office, hadn't he, for a good while?

A I don't know.

Q Were you in Mobile, at that time?

A No, sir.

Q I guess, then, we get down again you don't know how to quantify factors such as Mr. McNally's conduct in office and any problems he and Mr. Trimmier and others had been having in that position?

A No, sir.

Q All of that is omitted from these statistics?

A Certainly.

Q Now, going back to what you said at the very beginning of your examination by Mr. Still, did I understand you to say that the reason that you directed Mr. Parker to use 1970 economic data in connection with certain races

and did not give an absolute mean income.

It would say from one thousand to twenty-six hundred or something. It did not say the mean income is two thousand dollars. Do you follow me?

MR. ARENDALL:

No further questions.

MR. STILL:

Thank you, Mr. Parker. That's all.

THE COURT:

All right. You may step down.

Why don't we take a ten minute break right here.

(RECESS)

THE COURT:

All right. You may examine the witness.

WILEY L. BOLDEN

A Plaintiff, taking the stand in his own behalf, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q May it please the Court, this is Mr. Wiley L. Bolden. He is eighty-three years old. He was born December 30, 1892 in Hale County, Alabama.

He presently resides at 556 Bellsaw Avenue, Mobile. He is married and has three great grand-children. His education, he finished Tuskegee Normal, I guess it was called then, in those days, Mr. Bolden, in 1911.

He is presently a member of the board of directors of the non-partisan voters league and he has lived in Mobile since 1923.

Mr. Bolden, did you ever serve in the United States Army?

A Yes, sir.

Q When was that?

A Nineteen seventeen, September,1917 to March, 1919.

Q Did you serve overseas during the first World War?

A Yes, sir. I did.

Q Where was that?

A In France.

Q What was your rank when you were mustered out of the Army?

A My rank was sargeant. I held the rank of sargeant. They didn't have it classified then as it is now, but I was a line sargeant.

Q Were you decorated as a result of your service in the Army?

A Yes, sir. I was given -- I was sent something like a plaque.

Q What did the plaque say?

A It said Columbia gives to another son a new accolade of the chivalry of the Army. Wounded in action, September 4, 1918. Signed Woodrow Wilson, President of the United States.

Q And you returned to the United States, you say, in 1919?

A Yes, sir.

Q And you moved to Mobile when? 1923?

A April, 1923.

Q After you moved to Mobile, or shortly thereafter, did you attempt -- your Honor, recalling your prior instructions to me we intend to profer some evidence of how Mr. Bolden was able to register and vote and the circumstances surrounding that.

THE COURT:

Well, I don't see anything before 1950 -- anything after 1950 -- all right. Go ahead.

MR. BLACKSHER:

Q For the record, Mr. Bolden, you did register to vote in Mobile County in 1925?

A Yes, sir. I did.

Q And a white pharmacist, Dr. Ortman vouched for you and you were allowed to register because you were a veteran; is that correct?

A Correct.

Q But there were not very many other black registered voters during that period of time?

A No, sir.

Q Were the black voters who were registered during the period 1925 to say 1945 organized in any way?

A No.

Q Now, Mr. Bolden, did you know Mr. John LeFlore?

A I did.

Q Who was a Plaintiff in this case and died just a few months ago?

A Yes.

Q Would you tell the Court how you and Mr. LeFlore, when you and Mr. LeFlore first joined together in a Civil Rights organization?

A It was in April of 1925. We formed the Mobile branch -- we organized the Mobile branch for the national association of the advancement of colored people.

Q Approximately how many members did you start off with?

A Ten.

Q What kind of activities was the local branch of the N.A.A.C.P. principally involved with during the period 1925 until after the second World War?

MR. ARENDALL:

Objection, irrelevant.

THE COURT:

I don't really see any need in going into great detail. I don't want to circumscribe you too much. It is interesting, but I don't see how it will help us too much unless you have some particular point you want to make.

MR. BLACKSHER:

The only point that we want to show is that the local branch was not actively involved in the securement for blacks.....

A During that period, the N.A.A.C.P., the braches, were not allowed to participate in politics. It was against the regulations of the body -- I mean, the national body.

Q But the local branch did become active in voter registration in the second World War, did it not?

A Yes, we did.

Q Tell the Court what kind of activities the local branch engaged in?

A We engaged in the direction of our group being --

going down registering and those who could -- well, at that time, they had to be vouched for, you know about that, and you know the restrictions. That was after the Boswell amendment was declared unconstitutional, and then in 1946 -- and then in 1948 the case that came up from --went up from New Orleans through a member of the N.A.A.C.P.

Q Davis versus Schnell?

A No. That is a Mobile case.

Q Oh, I am sorry.

A Mr. Schnell was the register here in Mobile, but this man -- this man carried the Democratic party to the United States Supreme Court. The suit involved the Democratic party of the south who said it was then a private party.

Q You are talking about Smith versus Allwright?

A That is what I am talking about.

Q Were you one of the black voters referred to in Mr. McLaurin's article which is already in evidence who went, in 1944, and attempted to register and vote in the all white Democratic primary here in Mobile?

A I am. John LeFlore, Napolean Rivers,me and any number of others, Alec Herman and -- oh, any number of the older citizens, but we were debarred by it then, the then Sheriff Holcomb.

Q All right. Do you recall then the Davis versus

Schnell case striking down the Boswell amendment?

A Oh, yes, we do.

Q Thereafter, was there some other activity in the legislature, that you can recall, where the Boswell amendment or something like this was attempted to be re-established in Mr. Joe Langan, as a state legislator, fought against it?

A Yes, sir. But my memory does not serve me well enough to say who advocated that kind of legislation, but it was attempted and Mr. Langan, then a very fair minded and fine citizen, as well as one who represented the people, he opposed it.

Q Well, do you remember that that was about the time that Mr. Langan first came to the attention of the local branch as being one of the politicians who was acting in what was perceived to be in the interest of the black community?

A Yes.

Q What else did Mr. Langan do that caught the attention of the black community?

A Mr. Langan asked the legislature -- in other words, he held up -- he was then a Senator from Mobile. He was State Senator and he held up all legislation there until the black teachers of Mobile County were given equalization in salaries.

In other words, he equalized the salaries of the black

teachers of Mobile County and that, in my judgment, made him with me, especially, one of the most outstanding men in Alabama.

Q Was he thereafter supported actively by the local branch in his various election campaigns?

A Yes, he was. All blacks who realize what he -- his fairness toward them and that had -- I won't say that any way they supported to Mr. Langan because they should.

Q Did the local branch -- well, I guess it was the non-partisan voters league. Describe to the Court the difference between the local branch and the non-partisans voters league?

A During 1963, when Mr. Patterson was the governor of Alabama, then, and the N.A.A.C.P. was sued and brought into Court in Montgomery, Judge Walter Jones was the presiding Judge or Circuit Judge there, then, and he gave a judgment against the N.A.A.C.P. for a hundred thousand dollars. In other words, the chief counsel for the N.A.A.C.P. refused to turn over to him the list of its membership, because it was commonly conceited that reprisals would be taken against all those who held jobs like teachers and what-not.

So, Robert Carter was then the chief counsel for the N.A.A.C.P. and he refused and they slapped a hundred dollar fine on him and he immediately appealled the case to the

United States Supreme Court and, of course, we were held up for eight years.

Q What did that have to do with the non-partisans voters league?

A When they debarred the N.A.A.C.P., the injunction Judge Jones gave against us debarred us from activity, because our case was pending in the United States Supreme Court.

So, we went, what you might call, underground and organized the non-partisans voters league and we kept the work of Civil Rights going just the same.

Q What year was that?

A Nineteen sixty-three to nineteen seventy-one.

THE COURT:

What years were those?

A Nineteen sixty-three to nineteen seventy-one.

MR. BLACKSHER:

What happened in 1971, Mr. Bolden?

A The United States Supreme Court gave, you know, the decision -- I mean, they ruled in favor of the N.A.A.C.P. So, the N.A.A.C.P. didn't have to turn over the membership list and the fine was set aside.

Q But the nonpartisan voters league remained on and is still, today, is a separate branch of the N.A.A.C.P.?

A Yes, sir. Very much so.

Q In the time you have been with the nonpartisans voters league and before then, with the -- well, let's say 1965, and that is when you were in the nonpartisan voters league, have you and the other members ever discussed or attempted to encourage a qualified black candidate for the Mobile City Commission?

A I think we did. I am sure we did.

Q Do you recall who and when?

A Now, the cartwheel, by memory, doesn't click that well, but I do know we discussed it and some persons did run or did attempt to run.

Q You are thinking about 1973 when Ollie Lee Taylor and Lula Albert and Alphonso Smith ran?

A Oh, yes. I see I had forgotten them, but that -- yes, I think you are right. I know you are, because I remember Ollie Smith, because he is now in Florida.

Q Before then, were you successful in getting any other black qualified citizens to run?

A Not that I recall.

Q Why not?

A Well, one thing, we felt that it would be futile, because -- I mean, that year, when we knew if we ran a candidate in Mobile -- in the City of Mobile, it would be an overall thing and we didn't have enough votes to elect

anybody and, of course, we had to wait until,- in other words, our political strength was not -- we didn't feel was well enough up to advocate such a thing and I don't feel that same way now, if you are going to take it from an overall standpoint. I think it would be futile.

Q Mr. Clerk, would you hand the witness Plaintiffs' Exhibit 67? I don't think we have marked it now, but it is down there.

Mr. Bolden, I want you to look at these documents which are various affidavits signed by black persons. One of them is an affidavit by Henrietta Smith saying that she had been unable to register, because she had not passed the State voting test on August 3rd, 1964.

Another one, James Brooks, dated August 5, 1964 saying that he had been denied the right to register as a voter, because he incorrectly answered two of several different questions of government.

Similar affidavits by Joe O. Dickson.....

THE COURT:

Are you referring to the State government? I understand there were no Federal registrars in Mobile?

MR. BLACKSHER:

Yes, sir. Another one by Joe O. Dickson, dated August 3, 1964. Another one by -- well, I am sorry. Here is

a petition dated June 16, 1964 addressed to the Mobile County board of registrars signed by Mr. LeFlore and others; do you see that?

A Yes, sir. I do.

Q Concerning the tests that were being given to persons as they attempted to register?

A Yes.

Q And finally, an affidavit by a Carrie Louise Marshall dated February 11, 1965, saying that she went to the board of registrars and was asked there to sit in a separate room where negro would be registrants would be compelled to sit and take their tests, that she obeyed the admonitions of the white woman official of the board of registrars and went to the negro registration room.

Can you verify that these are records that we have taken from the files of the non-partisan voters league?

A I can.

MR. BLACKSHER:

We move their admission, in evidence, as Plaintiffs' Exhibit 67, your Honor.

MR. ARENDALL:

If your Honor please, they are clearly hearsay. I have no objection. I am satisfied there was some discrimination against them.

MR. BLACKSHER:

We offer them to show the latest date on which we could find overt .....

THE COURT:

What is that date?

MR. BLACKSHER:

February, 1965.

MR. ARENDALL:

All except the last one relate to occurrences in 1964?

MR. BLACKSHER:

That is correct, except the 1965 was a segregated registration line.

Q Mr. Bolden. That's all I have. One of the other lawyers may ask questions.

THE COURT:

Admitted in evidence, and you may cross examine him.

(Plaintiffs' Exhibit number 67 was received and marked, in evidence)

CROSS EXAMINATION

BY MR. ARENDALL:

Q Mr. Bolden, have you held any place other than that of a director of the non-partisan voters league?

A Well, we didn't have so many offices there.

THE COURT:

Have you ever been president, vice-president, secretary or treasurer?

A No. Judge, I haven't; no, sir.

MR. ARENDALL:

Q Have you been one of those who have determined who would be endorsed on the pink sheet?

A I have.

Q Have you considered that the blacks of Mobile have followed the endorsements of the non-partisan voters league as set out in the pink sheet?

A No, sir.

Q You say they have not followed them?

A If they followed them, they followed them of their own free will and accord.

Q Well, whether -- I understand that each.....

THE COURT:

The question is, though, the thrust of it is, Mr. Bolden, is it your judgement that the black voters have substantially followed the recommendations of the pink sheet?

A Yes, sir.

THE COURT:

All right.

A I do.

MR. ARENDALL:

Q In your opinion, is it proper to characterize the black voters of the City of Mobile as now constituting a block vote?

A No, sir.

Q In your opinion, would such characterization have been proper and, if so, during what periods of time?

A I don't think that -- I don't think that it had ever been so. I think that the people -- the black people of Mobile, who voted -- who went to the poles to the various wards where they voted, they voted their convictions and the non-partisan voters league put out a ballot and simply said that these are the men that we have screened and have taken their positions as to what their platform would be if they were elected to the various offices to which -- of which they sought, and the people believed in us, because we did not give them any misinformation.

MR. ARENDALL:

Q Well, is it fair to say that voting their convictions the black individual voters did what the pink sheet requested them to do?

A Most people who go to the poles now of all groups -- I feel this way about it, that most people that go to the

poles of all groups, they go there and vote, because somebody has given them some information about the attitude or the position of the candidates who is running for office and I think our people did the same thing. They didn't vote them, because we told them -- they didn't go by that sheet, pardon me.

THE COURT:

He is not suggesting coercion. What he wants to know, is do the black voters usually vote for the same candidate?

A No, sir.

THE COURT:

All right. Go ahead.

MR. ARENDALL:

Q Mr. Bolden, do you remember talking to your lawyers and I don't know which ones you talked to, but about answering some interrogatories that we put to each of the named Plaintiffs in this case?

A I guess I do.

Q Do you remember telling them how you wanted to answer those questions for yourself, telling them what you thought the answers were?

A I did.

THE COURT:

Mr. Arendall, I usually ask the lawyers to stay at

their counsel table unless they have some document they want to show to the witness.

MR. ARENDALL:

I was going to let him look at it.

Q I would like for you, Mr. Bolden, to look at interrogatory number 40-A and tell the Court whether I correctly read this.

In your opinion, is it proper to characterize the black voters of the City of Mobile as now constituting a block vote. Now, I want to show you the answer that your attorneys filed on your behalf, and there is a paragraph here where you will see that they say they thought this was an objectionable interrogatory, but look at the "A" and do they say and do you say to answer that question, "Yes".

Is that what the answer says to your interrogatory?

A I don't know. It doesn't have my name there.

THE COURT:

No. That is not the question. Does 40-A read "Yes"?

The Court takes judicial knowledge that it reads yes. I just read it there, really.

MR. ARENDALL:

Q Forty - B, "In your opinion, would such characterization ever have been proper and, if so, during what period(s)

of time,"? And was your answer to that, "B","yes, from the time that blacks were disinfranchised to the present."

Was that your answer, sir?

THE COURT:

He is asking you, Mr. Bolden, if that is the answer that appears here?

A I would like to make that a little more clear to me.

MR. ARENDALL:

Q Excuse me. Tell me whether or not that is the answer?

THE COURT:

I can see it does.

A Yes.

THE COURT:

Who are they propounded to and whom are they signed by?

MR. ARENDALL:

Judge, they were all signed by counsel, by agreement of the parties.

THE COURT:

They were addressed to Bolden and others?

MR. ARENDALL:

That is correct.

THE COURT:

All right.

MR. STILL:

Just for the record, your Honor, I believe they are signed individually.

THE COURT:

Well, let me see the answers.

MR. ARENDALL:

I beg your pardon, on the back of what I have here is your signature here, isn't it?

A That is my name.

Q And that is in that same sheaf of papers, the answers that I just asked you about?

A What does this say?

MR. ARENDALL:

That is what they call an affidavit.

A I know it is an affidavit, but what does it pertain to? Did I sign that affidavit?

THE COURT:

Is it your signature?

A That is my signature, yes.

THE COURT:

Do you recall signing it?

A I do.

THE COURT:

All right. Just one minute.

Have they been introduced in evidence?

MR. ARENDALL:

No, sir.

THE COURT:

They should be marked, for identification.

A I would like to see if I made that statement individually.

THE COURT:

Mr. Bolden, that is what it shows. These show the answers made by you and you signed it.

A Yes, sir.

THE COURT:

All right.

A All right. Then it is true that I signed it and to anything else, because of my memory I will retract that. Yes.

THE COURT:

You were born in what year?

A Eighteen ninety-two, December 30.

MR. ARENDALL:

Q Mr. Bolden, the non-partisan voters league endorsed

Mr. Taylor and Mr. Smith in their campaigns for the City Commission in 1973, did they not?

A I think so.

Q Did they endorse Lula Albert?

A I am not sure. I can't answer that. I don't remember, Mr. Arendall.

Q You knew Mr. Taylor, did you not?

A Yes, sir.

Q You did not know Mrs. Albert or Mr. Smith, did you?

A Now, just a minute.

THE COURT:

Give him time. He is an old man.

MR. ARENDALL:

Q Let's take them -- did you know Mrs. Albert before she became a candidate?

A Are these black candidates?

Q Yes, sir.

A What year was this?

Q Nineteen seventy-three.

A To the best of my memory, I cannot recall, to be truthful, and I couldn't say anything that I wouldn't stand on. I wouldn't.

So, I don't remember the non-partisan voters league endorsing these candidates and, so far as I am concerned, in

1972, I think I was a little ill then, Judge, because I went to .....

MR. ARENDALL:

May I ask counsel if they are willing to stipulate to his answers?

A No. I must say I think I had been operated on in 1972 and was in the Veteran's Hospital in Birmingham, Alabama, at that time.

THE COURT:

All right.

MR. ARENDALL:

May I ask counsel if they would stipulate that Mr. Bolden's answers to interrogatories, by saying he did know Mr. Taylor but did not know Mrs. Albert and Mr. Smith and did not support Mr. Taylor?

Well, that is all right. No further questions.

MR. BLACKSHER:

Well, I would like to say, for the record, Mr. Bolden has signed the interrogatories, but the Court will see that there were a number of interrogatories filed and each one is made up of a set of interrogatories which were drafted by the lawyers. We take responsibility for them, although they were approved by the witnesses and an appendix, in each case, of individual information and I would like to say, for the

record, that the way we interpreted the question and the interrogatory itself pertained to, as we understood the question, to whether or not blacks had voted in a polarized fashion.

THE COURT:

All right. Go ahead.

MR. BLACKSHER:

No further questions.

MR. ARENDALL:

No further questions.

THE COURT:

You may come down, Mr. Bolden.

MR. MENEFEE:

Your Honor, we would like to call Mr. James Buskey to the stand.

JAMES E. BUSKEY

the witness, called on behalf of the Plaintiffs and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

There were none of this nature.

However, there was, during the runoff, the week prior to the runoff, literature that was distributed by my opponent that I considered to be racially oriented.

Q Could you describe that literature?

A Yes. It was a full page tabloid called the "Leader", and on the front of it, the full page tabloid, my picture was there and covering about a third of the page and some wording to the effect that this is the man that ran second to me. The literature was, of course, printed by my opponent and that, to me, was an indication that, in my judgment, it was racially motivated and I can go into my reasons as to why I thought so.

I had, at one time, the tabloid, but I lost it. But some of the wording, although nothing specific about race, the wording that was on the tabloid said something to the effect, help me to win the election, and the implication was that I read into it that if I did not win, this would be the representative of Senate district thirty-three.

Q And your picture appeared there?

A On the front -- there were other pictures, but on the inside, indicating pictures of campaign workers and campaign workers of my opponent, but on the front of it my picture was the only one there.

Q Do you know if this tabloid was distributed throughout Senate district thirty-three, but only in some areas?

A It was not widely distributed. There were two areas we were able to pinpoint the distribution of that literature.

Q Where was this?

A One was the Eight Mile -- Whistler area and the other one was the Chickasaw area.

Q Are those areas predominantly white?

A Yes, sir. I think Chickasaw may be virtually all white.

Q What can you tell me about the racial composition of Senate district number thirty-three?

A The composition of Senate district thirty-three is generally fifty percent white and black. It might be as high as fifty-three or fifty-four percent black.

Q Is that population you refer to?

A Population, yes.

THE COURT:

Fifty-fifty, black and white, or maybe a fifty-four - forty-eight black and white; is that right?

A Right. Let me -- because I think you are exactly right in terms of population. It might be a little high something like fifty-six or fifty-seven in terms of population in favor of the blacks.

by addressing more forcefully those issues?

A Very definitely; yes, sir.

Q Do you have an opinion as to why they didn't address those issues more forcefully if they wanted the votes?

A On the part of white candidates who actively sought or who would actively seek the black votes, in my judgement, that if that person -- if those people are interested in winning, they would not pursue that course of action, because they would have what you call a white backlash in the white community, in my judgement, yes.

Q One student of local politics, Dr. Voyles said that a substantial black vote for a white candidate would be a kiss of death for that candidate if he was forced into a runoff.

Would you agree with that assessment?

A I agree. This is basically what I tried to pinpoint in my statement. If white candidates sought to address themselves to concerns of black residents, in my judgement, they will receive a white backlash.

THE COURT:

All right. Let's knock off until tomorrow. Be here at nine o'clock tomorrow.

(COURT ADJOURNED)

A Prior to 1974, in my estimation, it would have been a waste of time and money. One would have to run, at large, in either the City or County and, given that set of facts, the chances of winning the City election or County election on the part of a black would be nill.

Q The Prichard election, City elections are at large, are they not?

A Yes, sir.

Q And many blacks have sought office for the City elections in Prichard?

A Yes, sir.

Q What is the difference between Prichard and Mobile or Mobile County?

A In the City of Mobile in Mobile County, the voting strength of blacks is substantially lower than that of whites. In the City of Prichard itself you have a black population that is in the majority. Whether that is about fifty-five or fifty-eight percent, I am not sure, but it is a majority and consequently the potential voting strength of blacks in the City of Prichard is in the majority.

A black candidate running for an election in the City of Prichard has at least an equal chance of success at being elected and I think they are good.

Q Do you know either Mr. Alphonso Smith, Mrs.

race this past election?

A We have five who actively participated. There were seven who qualified.

Q Was there a heated campaign?

A It was a very vigorous campaign. There was no issues that burned in terms of controversy, but it was very vigorous in the sense that we had five people actively campaigning for votes and, to this extent, I guess you could say heated, but not heated in terms of controversial issues.

Q Was there, to your knowledge, any door to door canvassing or offers to take voters to the polls and sort of a great deal of direct contact between the candidates and the voters?

A Yes, sir. At least one, perhaps two. I know for a fact that one candidate did offer to take voters to the polls to vote and, as well to the Courthouse to register them. We did extensive door to door campaigning and I am sure, to some extent, some of the other candidates did some, but not extensively. The offers to take voters to the polls and, you know, register voters to register.

Q Within the black community what are some of the major endorsing groups?

A I would imagine that the two major endorsing groups would be -- one, the non-partisan voters league and, two,

only reason I interrupt, the projected trial time, which is rather lengthy and if these matters are between black candidates and majority black districts, I just think we are wasting time. If you had a black and white candidate, you might have some relative issue. It is extremely interesting. I like politics, but .....

MR. MENEFEE:

Yes, sir. I was following this line of questioning to show a black perspective on the strength of the non-partisan voters league.

THE COURT:

Well, if it is between blacks, what help does it have to us?

MR. MENEFEE:

All right, sir.

THE COURT:

I think it would have some relevance if it was white and black votes or candidates.

MR. MENEFEE:

Yes, sir.

Q Mr. Buskey, do you have any opinions as to why more blacks don't seek election to the City Commission and the County Commission and the County School Board?

A Yes, I have. Running at large, they wouldn't have

a chance. The way it is presently constituted, running at large would be a waste of time and money and energy.

Q Do you think many more blacks would seek election to these offices if they thought the chances were better?

A Yes, sir.

Q We have discussed the interest that was created in House district ninety-nine by the race this past May.

There were many other races being run at the time for County Commission and other posts, were there not?

A Yes, sir.

Q In those races, County Commission, in particular, can you name any candidates that made any appeals to the black community for their votes, any substantial appeals?

A Yesterday I tried to indicate that white candidates in those races did campaign on the black communities.

THE COURT:

Let's don't go over the same thing. I remember what you said yesterday. If you have something additional to that, you may.

MR. MENEFEE:

Mr. O'Connor, would you hand Mr. Buskey Plaintiffs' Exhibit number 3, please? I am sorry, I mean number 4.

Mr. Buskey, Plaintiffs' Exhibit number 4 shows voter turn out in predominantly black wards and predominantly

white wards during elections this past May?

THE COURT:

What is the number of the Exhibit?

MR. MENEFEE:

Plaintiffs' Exhibit number 4, your Honor.

THE COURT:

All right.

MR. MENEFEE:

Q There are five wards listed as predominantly black in the lefthand column, four of them being within House ninety-nine?

A Yes.

Q The turn out figure, rate of turn out, for those four districts reflect twenty-eight point four percent for County Commission place number one and then, taking the one other predominantly black district, district number thirty-five - one zero three - one, which, I believe, lies in representative Gary Cooper's House district?

A Yes.

Q It shows a turn out of twenty-two point seven percent -- see it with the asterisk in the middle of the page?

A Yes.

Q And then for the runoff it falls off to sixteen point five percent?

A Yes.

Q It shows a difference in the runoff election from when your race was being run against Mr. Flannagan of eleven -- almost eleven percent between the black districts and House ninety-nine and the one black district we have been able to sample outside of House ninety-nine.

Do those figures agree with your general observations on voter interests in the black community?

A Yes, sir.

Q Okay. That's all on that.

I would like to ask you a few questions further about -- referring to Plaintiffs' Exhibit number three.

Again, we have predominantly black wards and predominantly white wards. On the second sheet we have turn out figures on the second sheet of it we have turn out figures for 1973 City Commission race and we see, for example, place one runoff.....

MR. ARENDALL:

I beg your pardon. What Exhibit are you looking at?

MR. MENEFEE:

This is number three. Place one runoff, which was the contest between Mr. Greenough and Mr. Bailey.

You see a turn out differential between the black wards and the white wards of eighteen point seven percent for

time.

Because of the quickness on which it was focused, I think that, to a large extent, many blacks felt that it would continue and consequently the polls were forgotten and a lot of other processes.

THE COURT:

All right.

MR. MENEFEE:

Your Honor, there will be other witnesses who can discuss more fully the Joe Langan race in 1969 and Mr. Langan, later at the County Commission in 1972. We have some turn out figures in our Exhibit number 3 that reflect blacks turning to the polls in substantial numbers.

THE COURT:

All right. You may come down.

Whom will you have next.

MR. BLACKSHER:

Mr. Joe Langan.

JOSEPH LANGAN

the witness, called on behalf of the Plaintiffs, and after having first been duly sworn to tell the truth, the whole truth and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q May it please the Court, this is Mr. Joseph N. Langan. He is sixty-four years old. Presently resides at 267 Houston Street, Mobile, Alabama.

He has been a resident of Mobile, Alabama, his whole life. He is presently a practicing attorney in Mobile.

Mr. Langan, tell the Court the offices you have held during your career as a public servant in Mobile?

A Well, I served in the Alabama House and the Alabama Senate and Mobile County Commission and the Mobile City Commission, as far as elective jobs are concerned. Of course, I was on the board of education and numerous other positions and other appointive positions.

Q You were elected to the Alabama House of Representatives in 1939?

A Right.

Q And served one term?

A Yes.

Q You were elected to the Alabama Senate in 1947 and served one term?

A Well, the election was in '46 and the term began in '47 and I served one term; yes, sir.

Q And you were an elected Commissioner of the City of Mobile from 1953 till 1969?

A Yes, sir.

Q And you said you served briefly as a County Commissioner.

Would you explain that?

A Well, I served a little over one year on appointment as a County Commissioner.

Q That was in 1950 and '51?

A Right.

Q So, altogether you won, through the elective process, one term as a State representative, one term as a State Senator and four terms as a City Commissioner?

A Yes, sir.

Q And you were defeated three times at the polls?

A Yes.

Q In 1951 by Mr. Tom Johnston and that race was for the .....

A State Senate.

Q In 1969, by Mr. Bailey for the City Commission?

A Yes.

Q And in 1972 in a runoff with Mr. MCConnell for the County Commission in the Democratic primary?

A Yes.

Q Mr. Langan, do you attribute your loss in 1951 to Mr. Johnston in any way to racial factors?

A Yes, sir. I feel that that was one of the main factors in that election.

Q Specifically how did it come into the picture?

A Well, I had been rather critical of some of the racial practices in Mobile from the time I got out of the service and was elected to the State Senate regarding the bus situation in Mobile and also in the State Senate the Boswell amendment had been declared unconstitutional and they introduced a new amendment to regulate voting in Alabama and tried to cure some of the defects that the Court stated had existed in the Boswell amendment and four other Senators and myself filibustered for several days and worked until we finally defeated it by filibustering it through the end of the session of the legislature and, of course, there was other action that I had taken on helping to bring about the equalization of pay for both black and white school teachers in the Mobile County school system.

THE COURT:

The Boswell amendment was really a literacy test aimed at blacks, wasn't it?

A Yes, sir.

MR. BLACKSHER:

Q And you are saying that those actions you took on behalf of equalizing black and whites hurt you in that election?

A I am sorry, I didn't get that.

Q Those actions hurt you in 1951?

A I think, at that time, it very definitely did. From correspondence I received and from things in the legislature and all it played an important part in that election and, of course, at that time, very few blacks were voting.

Q That was still at the beginning of your political career, so to speak.

What lessons did you learn from that campaign on racial overtone issues?

A Well, I don't know. As I say, sometimes I began to realize that no matter how high the ideals you might have, sometimes you have to be a pragmatist and realize there are certain things more important to a person's economic livelihood and things of that nature. So that there are areas that you should work in that can bring about good and still don't bring a lot of clash and a lot of animosity.

Q You knew John LeFlore?

A Yes.

Q And during the time that you were on the City Commission of Mobile you had occasion, didn't you, on several occasions, to deal with Mr. LeFlore and hear his complaints

about changes that he was seeking on behalf of the N.A.A.C.P.

A That is right, sir.

Q Were there some occasions when you told Mr. LeFlore that some of the things he was asking were just more than you could provide or seek as a City Commissioner?

A Well, in several conversations with him I pointed out that I felt that there were things that the N.A.A.C.P. and other organizations were advocating that really from an ideal standpoint they were wrong and things that needed to be corrected, but as far as the black people in the community were concerned, I thought that there were other things much more important for them to attain and, therefore, the things that would really help them economically and help them to obtain jobs and a fuller life were more important than the pure ideals of what our government should be.

Q Concerning those things that you thought could not be accomplished through the political process, did you ever advise Mr. LeFlore that he should try to use the Courts to seek re-address of those grievances?

A In discussing with him, he very much believed in legal process and in proper proceeding to obtain the ends that our government established on the principal that if we do have laws that are in conflict with the constitution and denied rights to persons that are guaranteed to them, the

places to find re-address is through the Courts and not through public violence and things of that nature.

We did many times discuss if changes were needed that he should go to Court to bring about those changes.

The things that we could do within government we tried to do, and the things that we felt were issues that should be decided by the Courts we advised he should go to Court.

Q In any event, you did run successfully for the City Commission in 1953?

A Yes, sir.

Q And stayed in office until 1969; that is, four terms?

A Yes, sir.

Q Did the racial issues surface in any of the elections until 1969?

A Well, it came up some in the 1957 election. Of course, as the issues grew and time went on and, of course, they became much more the focal point of pretty near every political campaign we got into in the '60's with the Civil Rights movement and other activities and it was brought to the attention of more and more people and people began to make their decisions based a lot on their position on racial questions.

Q Do you think that the electorate made their decisions as between you and Mr. Bailey in 1969 along racial lines?

A I think it was a determining factor in the election; yes, sir.

Q The Court has just inquired of the last witness about the fact that there appeared to be a drop-off in the black wards in support of you in that 1969 election against Mr. Bailey.

Would you explain what happened?

A Well, there was an element in the black community here that became very active about that time in the Civil Rights movement in the community and they took the attitude that anyone who didn't do everything that they wanted done was a racist and in their papers they condemned me for being a racist and they got out and worked to try to -- their philosophy became that there is no one in the City Hall or no one running for City Commission who is worth voting for, and, therefore, don't vote.

They put on a very active campaign to keep the people from voting. As a matter of fact, many people were standing in front of the wards taking pictures of people that went in and I was told by many people that tried to go vote that they were threatened.

Q Was this the NOW organization that was associated with Nobel Beasley?

A Yes.

Q Did Mr. LeFlore and the non-partisan voters league endorse you in that election?

A Yes.

Q Did they attempt to rally the support of the black community for you?

A Yes.

Q Would the Clerk please show Mr. Langan Exhibit 61, the Exhibit that we were looking at a moment ago. Your Honor, Plaintiffs' Exhibit 61 is in one exhibit, a large number of newspaper articles that we have copied in exchange with the Defendants and I would like to try to use them as one Exhibit, if there is no objection, just to simplify matters.

THE COURT:

Fine. Let's take a fifteen minute break here.

(Plaintiffs' Exhibit number 61 was received and marked, in evidence)

(RECESS)

THE COURT:

It was only about seventy-five percent of what voted in 1965.

Q And it is also true that the voter turn out in the black wards were substantially less than had been expected?

A Yes.

Q And that was attributed, you said in large part, to this boycott that an organization in the black community organized?

A I think that had definite effect on it. Of course, as I say, the total vote was down from what it had been; it was down even more so in the black wards.

In other words, the wards I just enumerated, compared from 1965, they dropped from six thousand to three thousand some odd votes, about twenty-eight hundred vote decrease.

THE COURT:

Almost half less?

A That's right.

MR. ARENDALL:

Would you give me those figures?

A In the wards that I enumerated in 1965, in those wards I received six thousand four hundred and seventy-nine votes. In 1969 I received three thousand six hundred and ninety-seven votes.

MR. ARENDALL:

Thank you.

MR. BLACKSHER:

Q What other factors were, in your opinion, accountable -- accounted for the total reduction in voter turn out?

A Well, we had just had the hurricane the day before. I think that accounted for some of the people not voting, plus the fact that I think that there was a certain amount of apathy. More people were satisfied with the operation of the City Commission than what they had been in the term between '61 and '65.

I think there has been a lot of criticism of the operation of the government between the '61 and '65 term and, therefore, more people were interested in bringing about a change where in 1969 they were fairly well satisfied with the governmental operation and, as a consequence, more people go to the polls to vote against people than what they do to go to the polls to vote for people. As a consequence, there is not a lot of opposition to the people in office and you won't have as good a turn out as they do when you have that opposition.

THE COURT:

The interest of change must have not been directed against you in '65. It must have been somebody else?

A Yes, sir.

MR. BLACKSHER:

Q In fact, Mr. Bailey was your only opposition in the election; is that correct?

A In '69. In '65 there were four or five that ran against me, at that time.

THE COURT:

Were any of the incumbents defeated in 1965?

A Both of them other than myself; yes, sir.

MR. BLACKSHER:

Q The hurricane you are speaking about was Hurricane Camille, of course?

A Yes.

Q Explain specifically how that reduced voter turn out, in your opinion?

A Well, it had caused some slight damage around the Mobile area and also a number of people that owned homes across the bay had damage from water, damage along the waterfront there, and many people had gone over to check. In other words, it was the first day they got to go across the causeway to check on their property and there were a lot of people cleaning up limbs and debris and things around their home where the wind and rain and everything caused debris.

I think they begin on page forty-eight and page forty-nine.

A Of course, there are some write ups there that concern it. The first ad here, it looks like is one of mine on page or part of one of mine on page forty-six.

Q This is your ad?

A Yes. And then forty-seven is part of my ad and forty-eight is an ad of my opponent, yes.

Q And so is forty-nine?

A Yes.

Q And fifty?

A And page fifty.

Q All right, sir. Page forty-nine is an ad that shows you, a picture next to that of Mr. LeFlore, and says, "Will you let this pair run your City for another four years?" referring to Mr. LeFlore as a person that was appointed by you to the Mobile Housing Board?

A Yes.

Q Did that kind of an ad cost you votes in this election?

A I don't think there was any question. It would have cost me votes in white wards, yes.

Q You were, for a certainty, during that election, were tagged, as it were, with the black votes; is that correct?

A Yes.

Q Nevertheless, you say you believe you could have won if you had had a solid black turn out?

A Yes. If the black vote had turned out any where near the number that had turned out four years previously I would have had a plurality in that election.

THE COURT:

Let me ask you a question.

A Yes, sir.

THE COURT:

Now, you started running for City Commission in 1951?

A Fifty-three.

THE COURT:

Fifty-three. You had two previous elections before the '65 election?

A Yes, sir.

THE COURT:

When did the black vote first become a significant factor in elections.

A It was beginning to build up a little bit in '57. Actually it was '61 when they were beginning to put on some voter registration programs.

THE COURT:

Do you have any recollection of what the total

didn't quite work out.

Q Is it fair to say, on balance, the major factor contributing to your defeat was the racial issue?

A That and apathy, the people not voting.

Q Nineteen seventy-two you ran for the County Commission and got into a runoff with Mr. McConnell in the Democratic primary, which you lost, correct?

A That's right.

Q Would you say that race and racial issues played an important role in your defeat there?

A I think it played an important role. However, you had there an entirely different constituency and there were many other factors involved in that election.

In other words, there were many communities in the outlying communities, the City officials of those communities I had opposed in trying to work out fiscal matters that would have been to the benefit of the City of Mobile and there were areas that I had brought about the annexation to Mobile that had surrounded those communities and, therefore, they were fearful -- and I had taken the stand that the better and most efficient kind of government was a metro form of government, and they were fearful of that and, as a consequence, I had a lot of opposition in these communities that had nothing particularly to do with race.

THE COURT:

What year was that election?

A Nineteen seventy-two. But the racial issue, as I say, it was played up and my opponent did use it as one of the main thrusts in the campaign and, particularly in these communities I am talking about, many of which were the people that had fled from the City to get away from the racial situation and it added fuel to the fire. I think the racial issue did play an important role in the campaign.

Q For the record, if you will look at that Exhibit 61 again, pages fourteen, fifteen, sixteen, seventeen, nineteen, twenty-one, twenty-two, twenty-three, twenty-five and twenty-six, and that's all I see relating to Mr. McConnell's ads; can you identify them as ads from that campaign?

A Yes, sir. As I say, you can see this many of them -- of course, a lot of them were just absolutely -- well, taken out of context, but, as I say, a lot of them were thrusted toward the racial question.

Q Now, there was no black boycott of the polls in 1972?

A No.

THE COURT:

Black what?

MR. BLACKSHER:

Boycott, your Honor.

Q How do you distinguish the results in 1969 and 1972?

A Well, as I say, I received, within the City, a good vote. It was just a question of, as Mr. McConnell here pointed out in one of his ads in the first race, in that election he enumerates two, four, six, eight of the group of wards that I enumerated awhile ago.

Q As predominantly black?

A Yes, and in this election against Mr. McConnell I received thirty-seven hundred and twenty-six votes; whereas in the '69 race I only received thirty-six ninety-seven in all of the black wards. So, as I said, had I gotten this kind of vote then in the '69 election, it would have made the difference.

Q My point is, it didn't seem to do you any good in 1972?

A No. It did not. It was a different kind of constituency and it involved other issues and problems I had created for myself in those outlying areas.

In other words, when I had moved out of the limits of the City of Mobile and brought in that opposition, plus the fear of the people of Chickasaw, Saraland, Satsuma, Mount Vernon, Bayou la Batre, and so forth. In other words, the people in office down there had felt that I was trying

that you think you could have won in the City wide race and I guess you are saying in this County wide race, even though you were tagged with the black vote, is that what you are saying, other circumstances being different?

A Yes. I would say if we turned back the pages of time to when I ran for State Senator, something back in those times, when I hadn't been involved in some of these issues with the smaller communities and had brought about changes that were detrimental to them where I could have gotten any kind of break at all in the County and then with a good vote in the City I could have been elected.

Q Could a black candidate in a City wide or County wide race get elected?

A Well, so far, they haven't and it is most difficult to see -- I don't know whether circumstances will be changing, but so far none has been.

Q You are not willing to express an opinion on it?

A Well, I don't think they could. I mean, the evidence speaks for itself. They haven't been. So, I can't conclude other than the fact that they couldn't be, because there have been several black candidates who have run for County wide position who were iminently qualified and should have been and could have been elected, but who were not. So, as I say, I feel that the opportunity had been there.

There were men, as I say, that were well qualified running for school commissioner and things of that nature who were not elected and so, therefore, I just feel they could not, as yet, be elected in Mobile County.

THE COURT:

Mr. Langan, has there been somewhat of a polarization of votes and is it more or less true or not that with polarization that is difficult for black candidates to be elected and increasingly difficult for white people to be elected in black majorities?

A Yes. I think so. As I say, I think it, of course, depends a lot on the person.

THE COURT:

I guess the thrust of my question is has there been somewhat of a marked polarization?

A Yes. I think there has been some break down, although, in some of your areas and the schools and younger people, there have been blacks that have been -- blacks that have been elected in communities that were mainly white, like the University of South Alabama. I mean, there have been many people out there and I was out .....

THE COURT:

You mean in school politics?

A Yes, sir.

THE COURT:

All right. You expect that to translate into .....

A Yes. I think there is a change taking place. I think possibly Murphy High School is a majority of white students there and yet their president of the student council for the coming year is a black person and the president, last year, was a white person. I spoke at the change over from one regime to the other and, as I say, there, I think, it shows that the students are willing to elect a person irrespective of their race.

MR. BLACKSHER:

Q Mr. Langan, I don't want the record to seem to indicate that the non-partisan voters league in these black communities in general supported you just because of what you did in the 1949 legislature for equalizing the pay of the black teachers.

Were there specific issues that you supported that had special uphill to the black communities during the '60's when you were a City Commissioner?

A Well, I think no matter whether it is a psychological or ideological or economic benefit, I think most people do vote for people because of something that either they get or something they do.

I think, of course, that there were many people in

the black community that voted for me, because while I was in the City Commission we paved many streets in black neighborhoods who never had a paved street before and put water and sewer service in those areas that didn't have it before and parks in those areas that didn't have parks before. I think there are many things that happened or that we had pledged ourselves to do that brought about a vote in those communities.

Q Were you consistently endorsed by the non-partisan voters league and, of course, they didn't come on the scene until when, as an organization?

A Well, it was on up in the latter part of the '50's before they really became real active. As I say, they had participated before, of course, but they didn't have the strength.

There hasn't been many black voters in the community due to the restrictions on registration and other things and it was only after some of those things were broken down and they were free to get registered to vote.

Q What about the so called pink ballot? When did that first appear?

A I don't know exactly when.

Q Were you ever endorsed -- you were, weren't you, on the pink ballot?

A Yes.

Q Can you describe to the Court the process that you went through to ask for and obtain that endorsement?

A Well, I didn't ask for it. They endorsed me without my asking for it and they, just like the newspapers or other groups, they set up a ballot on which they marked the person that they felt should be elected to office and I was one of those that were on the ballot.

Q Did you contribute to the non-partisan voters league?

A I paid a contribution to them to help pay the expenses. In fact, they told me if I would make a contribution they would appreciate it and I did.

Q And it was your understanding that it was made for the printing and the distribution of the ballots?

A That's right.

Q How effective, in your opinion, was the non-partisan voters league and its pink ballot in delivering -- if we can use that word -- in delivering the black vote in Mobile?

A Well, it is difficult to say how effective it was. I would say that generally whoever's name were on there within the black community obtained an outstanding vote.

Q Was there a period of time when that -- when the influence of the pink ballot was greater than at others?

A I think in the early days of voter registration and all and before the Civil Rights movement really got into a big swing, up in the middle sixties, I think that it had -- the older Mobilians and the people in the black community that knew each other and lived here together and they worked real closely together and they were very effective.

As I say, as time went on and you had some of the young people and other people from out of town that got into the black community and began their own agitating and their own small groups, I think they began to split up its effectiveness, because you had a certain amount of split off among some of the younger black people in the community.

Q I think you have referred earlier to the fact that incumbents were having problems generally, at one point, in the sixties?

A As I said, usually people will go to the polls and vote against somebody. In other words, they will be against an incumbent and, therefore, they will go to the polls and vote, because they have antipathy towards somebody where, otherwise, if they are pretty well satisfied with the way government is going or if there is nobody particularly involved -- in fact, that sheet I had a moment ago with regard to the 1969 election. In that election there were

THE COURT:

You gentlemen might want to stipulate to that or study it and come up with some other figures.

All right. Whom will you have next?

MR. MENEFEE:

Mrs. Lonia Gill.

LONIA M. GILL

the witness, called on behalf of the Plaintiffs, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mrs. Lonia M. Gill, fifty-eight years old and lives at 2854 Whitlar Street and married and mother of two children. She attended Mobile County Training School and Tuskegee Institute. She has been a resident of Mobile County all of her life.

She is executive secretary of the A.M.E. Zion Church; is that correct, Mrs. Gill?

A That's right.

A Some of the campaign literature?

Q Yes, ma'am.

A Yes.

Q And Mr. Alexander's carried his?

A Yes.

Q Do you think it is a fair statement to say that Mr. Alexander is known as an opponent of busing and an associate of Governor Wallace?

A Yes. Sure.

Q Mrs. Gill, is it fair to say that most of your support in that election came from the black community?

A I can't say that in the runoff. I don't know that most of it did or not. I really don't know, because I feel that I was supported by both, but naturally I am sure that most of them came from blacks, I believe.

Q Mrs. Gill, about how much money did you spend in your school board race?

A I don't have the figures with me. It couldn't have been too much, because I didn't have too much. I just had enough to take care of all of my obligations.

Q You are talking about maybe a couple of thousand dollars?

A Well, something like that. Perhaps two thousand dollars, if that much.

Q I see. Did you use any radio or television ads?

A I did. I was on radio and television quite a bit. This was why I can say no one really had to wonder who I was.

Q Did you have to pay for those spots or were they public service?

A No. They was donations from friends.

Q I see. Do you have an opinion as to whether your campaign created much interest in the black community and whether you received substantial support within the black community?

A I think it created quite a bit of interest. Now, when you say in the community, do you mean the County community, since this was a County race?

Q Yes, within the County.

A Within the County community. I think it did, but not as much as it should have, but it did create quite a bit of interest.

Q Were you endorsed by the non-partisan voters league?

A Yes, I was.

Q Did you receive endorsement from the voters registration organization?

A Yes, I did. Would you allow me to say that even the Mobile Press Register endorsed me.

Q From your experience, do you have an opinion as to

whether or not a black running, at large in the community in Mobile County, has a reasonable chance of winning an election against a qualified white opponent? How would you describe the chance of a black citizen?

A Personally, Mr. Menefee, I would think that the chances would be very slim, really.

Q Would you also have that opinion for running at large in the City of Mobile?

A Yes, sir.

Q Do you see a great deal of difference in terms of the racial issue between Mobile County and Mobile City?

A It is almost equal. I have had a chance to cover the County even before the race, and I have known the City, you know, all of my life. I don't see very much difference in the County and the City.

Q Do you know Dr. E. B. Goode?

A Yes, sir.

Q Dr. W. L. Russell?

A Yes, I do.

Q And Mrs. Jackie Jacobs?

A Yes.

Q These were three previous candidates for the school board and received substantial support from the black community. Were they well known in the black community?

A I would think so.

Q All three of those candidates also gained a runoff against a white opponent, just as you did?

A Yes, sir.

Q Do you know a Mr. Alphonso Smith, Mrs. Lula Albert or Mr. Ollie Lee Taylor?

A Not personally, but I know of them.

Q They ran for the City Commission in 1973.

Were they as well known in the black community as the previous list of blacks, black school board candidates?

A I can't say yes or no to that, simply because I don't know that. Because I don't know everybody, but I really don't believe that they are.

Q Mrs. Gill, if it was necessary to raise approximately twenty-five thousand dollars to run a credible race for the Mobile County Commission or the City Commission, do you think a black candidate, would be black candidate, could raise that kind of money and would enter the race?

A I don't know. I doubt seriously if a black candidate could raise that kind of money, thirty thousand dollars or twenty-five thousand dollars.

Q Would you be willing to undertake a race?

A Not County wide or City Commission either, for that matter.

Q All right. What else?

A After that, well, we dealt with Judge W. Brevard Hand, I think. I happen to have served as chairman of that bi-racial advisory board. I have served in Mobile City as Mobile County wide president of the P.T.A. and then served as a Mobile County wide president of the P.T.A. and then was elected State president of the P.T.A. and I have served on so many committees.

I have worked for the City of Prichard, having been appointed the first black department head as director of the community development program in the City of Prichard, and the member of the board of adjustment. I was also a member of the board of advisory committee out there in Prichard and one of the trustees of the formerly sixth district hospital when it closed. It was the Keller Memorial Hospital and it was just any number of things associated with Mobile or with Mobile County.

I could go on and on. I am not a newcomer. I have been in Mobile and Mobile County all of my life and a lot of people know me.

Q And you have a substantial support of whites in your race, did you not?

A I think I did. I really believe I did, not being in a position to actually know how many votes I got, but I believe

A No, Mr. Menefee.

MR. MENEFEE:

That's all.

THE COURT:

You may come down.

MR. MENEFEE:

Your Honor, we would like to call Mrs. Jerre Koffler next.

JERRE KOFFLER

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mrs. Jerre Koffler. She resides at 4208 Rochester Road and is married and the mother of two children. She attended the University of Alabama, Springhill College, University of South Alabama, and has lived in Mobile County since 1954 and presently employed at public relations counsel.

Mrs. Koffler, is that correct?

A That's right.

Q Mrs. Koffler, did you run for the school board in

A That's right.

Q Mrs. Koffler, down at the bottom, would you describe the layout of the ad at the bottom?

A At the bottom. That is May 2nd block vote, names the wards, and there are four candidates listed there.

Q What is the import of that? What is the .....

A I think it is trying to show that certain block areas that the candidates who have the most votes got the black vote and the candidates that have the less amount of votes.

Q You were one of the candidates that got some of the most votes in a black area?

A Yes, sir.

Q Can you tell me something of your relationship with the black community or education in the Mobile area? Why did you receive such support from the black community?

A Well, I guess it was because I was willing to see if there was some way we could make the April Supreme Court decision work in Mobile County. I was anxious for the school board to get on with the business of educating the children and not fighting a losing battle against the Supreme Court of the United States. And I believe that was coincided with what these blacks wanted to do and what a number of whites wanted to do.

Q Do you have some comments to make on -- well, for

example, in this ad number one "Signed agreement with N.A.A.C.P. to achieve total integration and total busing"?

A That was one of the things that I tried to take to Court. I did not sign any agreement to achieve total integration or total busing, nor do I think any agreement signed by anyone would be any different, whether it meant to start busing or stop busing. I did not sign any agreement with anybody.

Q Would you describe some of your activities in trying to ease this integration process, please, ma'am?

A Can I take a few minutes to go through that?

MR. ARENDALL:

If your Honor please, it seems to me we are going awfully far afield here.

THE COURT:

Yes. The thing you are showing is some identification with blacks, a racial factor. It would be interesting, but I don't think that would be a great deal of help.

MR. MENEFEE:

Okay, sir.

Q Mrs. Koffler, during the 1972 campaign, did you receive any threatening phone calls?

A Yes, I did.

Q Was this a common occurrence?

A I would get phone calls in the middle of the night saying, "Where is your nigger loving wife?", and my husband generally answered this, because I got a number of threatening calls of that same kind and he would say, "She is sound asleep", and that would stop that, but that went on for about three months.

Q Mrs. Koffler, is it fair to say that race was a major issue in your campaign?

A I would think so.

Q Do you think the term, "block vote" has racial connotations as used in Mobile County politics?

A As used in this particular ad, I would say it did.

Q Tagging you with a block vote and certain racial identification?

A I would think so.

Q Mrs. Koffler, have you been active in other political campaigns?

A Through my work and prior to my work, yes, sir.

Q Would you describe the period of time in which you have been active in these political campaigns?

A I think the first real political experience I had was the Brewer - Wallace governor's race, and then, in my school board, and then I went to work right soon after that and we have handled some political clients in our work.

Q As recently as this past May?

A Yes.

Q Mrs. Koffler, from your experience, do you have an opinion as to the prevalence of race as a campaign issue in Mobile County, Mobile City politics; is it a major factor?

A That is a hard question to answer. I would say that, in my particular race, it was a big factor, because of the circumstances. I noticed a little bit of it in this last May race.

I think that if a candidate addresses himself to a specific black issue that he is liable to or she is liable to run into a little bit of race politics.

Q Is it always a potential issue even between two white candidates, if the candidates want to play on that?

A I can't say that it is always a potential issue. It depends on what the issues are.

If the issues are that such it causes a rift, yes. It can be kind of potent. There are many races, I guess, that doesn't have any kind of racial discrimination in them.

Q What is your religion, Mrs. Koffler?

A I am Jewish.

Q Was that an issue in your campaign?

A No, it was not.

Q Do you know whether -- from your experience, has

religion been an issue in campaigns?

A I have never come across it.

Q What about campaigns exploiting possibly national origin, against ethnic groups, was that ever an issue in Mobile County politics as you have observed?

A The only ethnic issue that I have come across is the black - white. There might be some, but I just don't know about it.

Q Is there any issue in Mobile County politics that you have observed in recent years that has the pervasive effect that race has?

A Unless it would be crooked politics.

Q Do you think race will also be an issue if a black candidate runs against a white in our present situation?

A I would like to say I wish it weren't, and I hope it isn't and that we have outgrown it, but from a few things that happened in the May primary, I don't believe we have yet gotten to the point where we can say race is never an issue.

Q What sort of thing did you see in the past primary?

A There was another block vote against a candidate that was run in the paper.

Q What race was that?

A It was one of the District Court Judge races.

Q Was that in the Loveless - Kearney race?

A Yes, it was.

Q Was there an attempt to tag one of the candidates with the block vote?

A Yes, sure was.

Q Where were those ads run?

A I saw, and this is a rather funny place to see it, I saw one in the Mobile Beacon and I believe one was -- somewhere right in the County newspaper. I am being evasive, because I was out of town for a week of the runoff and I have only seen them clipped and I am not really sure which papers they were run in.

Q Do you know of any other racial campaigning this past May?

A No, I don't.

Q Mrs. Koffler, to what extent or how directly can white politicians address issues of particular concern to the black community? Is there a certain point in which it becomes a political liability to speak of issues of particular concern to blacks?

A Yes. I would think, at a certain point, it could be a liability.

Q Can you give me any examples of perhaps this past May any of the candidates who might have addressed issues of

A Never specifically. In fact, I don't recall ever meeting with a non-partisan voters league member, per se.

Q Did you make any contribution to the non-partisan voters league?

A No, I did not.

Q How would you describe the chances of a black candidate would have running, at large, in Mobile County and Mobile City against credible white opposition?

A Well, in my opinion, it would be kind of a rough race for them.

Q If you felt that your chances were similar, would you run?

o I don't think so; no.

MR. ARENDALL:

That is irrelevant.

MR. MENEFEE:

Q What is your estimate of and experience of running for the Mobile City Commission under the present, at large, system?

A I can only tell you what it cost for me to run and I would imagine to run for the City Commission it cost me five thousand dollars. So, I would say to run a credible race for City Commission would cost anywhere between ten thousand and on up. I am sure there are some candidates that

Q During the time that you have familiar with it, has the non-partisan voters league complained to the government here in Mobile that blacks aren't appointed to various City boards and committees in fair numbers according to their representation in the population?

A Yes, sir.

MR. BLACKSHER:

Would the Clerk show the witness Exhibit 67? One minute, please. I have the wrong Exhibit. I am sorry, it is 64.

Your Honor, what we have here in Plaintiff's Exhibit 64 is the summary of the City committee appointments that have been provided us by the defendants in the course of discovery proceedings. I would like to move its admission in its present form having been exchanged with the Defendants.

THE COURT:

All right.

(Plaintiff's Exhibit 64 was received and marked, in evidence)

THE COURT:

Let me ask you a question about this, you have total members and total prior members. Can you explain that?

MR. BLACKSHER:

Q I am talking about the league.

A The league -- well, many of them.....

Q Isn't it a fact, Reverand Hope, in the course of your connection with the league, its endorsement has been actively sought by candidates over the years that you have been connected with it?

A Yes, sir. Definitely so. I explained that to start with.

Q And wasn't that true in the last City Commission race in 1973?

A Yes, sir.

Q Every candidate in the race sought your endorsement, didn't they?

A I believe all of them did.

Q And were anxious to have as many black votes as they could get, weren't they?

A Yes, sir.

Q And over the years your success in getting black votes to go along with league endorsements has been proved by the efforts of candidates to get your endorsement, isn't it?

A Yes. To a certain extent.

Q All right. Now, did I understand you to say that what the league did was to try to endorse only people whom, in their judgment, would represent all people, black or white?

A Yes, sir.

Q In your opinion, has the league endorsed only such people?

A In my opinion, they has; yes, sir.

Q So, in your opinion, every candidate the league has endorsed would have been, if elected, a fair representative of both black and white?

A That was our motive.

Q Is that your opinion of the facts?

A Yes, sir.

Q Now, then, you have had notable success in electing candidates that the league has supported, have you not?

A Yes, in some instances.

Q Now, as a matter of fact, in the Greenough - Bailey race the league originally supported Bailey, didn't they?

A No, sir.

Q Who did they support?

A Didn't they support Mr. Greenough?

Q Well, let's put it this way -- I can't answer your question.

Let me ask you this. Didn't the black vote in effect put Gary Greenough in office?

A I wouldn't say the black vote alone, sir.

THE COURT:

Was it the difference?

A I believe so.

THE COURT:

All right.

MR. ARENDALL:

Q Was it also the difference in the Mims race? Could Mims have been elected without it?

A Well, that was the reason we endorsed them, in order that we would support those men who we felt would represent all of the people and then those who we endorsed we would ask the league to support them, but remember, the league didn't always support wholeheartedly who we endorsed.

Q I think you had better explain what you just said to me. Did I understand you to say that the league didn't support wholeheartedly support or was it the blacks?

A The blacks.

Q In the last race Mr. Doyle didn't have opposition, did he?

A No, sir.

Q So, there wasn't any question there of solicitation?

A No, sir.

Q Now, you were talking about the inability of blacks over the last six or eight years getting elected in the County wide races.

No further questions.

THE COURT:

Will you put witnesses on just what you have been over the composition in the appointing authorities?

MR. ARENDALL:

Yes, sir.

MR. BLACKSHER:

One question, your Honor, that I would like to clear up.

THE COURT:

Go ahead.

REDIRECT EXAMINATION

BY MR. BLACKSHER:

Q Reverand Hope, in answering Mr. Arendall's questions, did you mean to say that every candidate that the non-partisan voters league has endorsed has turned out to represent the interest of the black community fairly?

A In recent years they have.

Q How recent do you mean when you say recent years?

A In this last election and maybe the election prior. I think, in my opinion, they have done a very good job in carrying out their obligations toward trying to be fair to all people.

Q Is that your opinion or the opinion of the entire league?

A Yes. That is the opinion -- that is what I am trying to speak for. They feel that the candidates that they have elected here in recent years has done a very good job along that line.

Q Reverand Hope, has the non-partisan voters league ever sought to encourage or to file a candidate of their own from the black community .....

MR. ARENDALL:

Objection, not in rebuttal.

THE COURT:

I will let him ask him.

A I beg your pardon, sir.

THE COURT:

You may answer.

A It has been very far between. We haven't had too many candidates who are black to run. I would think because they felt that they didn't have a chance to win, but Mr. LeFlore, he ran, himself, I believe for the Senate. Not that I believed that he believed that he was going to win the race, but to encourage blacks to prepare themselves or run for these different offices.

MR. BLACKSHER:

That's all, your Honor.

THE COURT:

You may come down, Reverand.

Whom will you have next?

JAMES SEALS

the witness, having been called on behalf of the Plaintiffs, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mr. James Seals. He is forty-eight years old. He lives at 404 Palmetto Street. He is married and has four sons and holds a masters in music education. He has lived in Mobile County all of his life. He is an instructor of music at Bishop State Junior College and he works with the Mobile Jazz Festival and has been active in his neighborhood, which is often called "Down the Bay Neighborhood"; is that an accurate statement, Mr. Seals?

A Yes, it is.

Q Mr. Seals, have you spent most of your life in the down the bay neighborhood?

A Well, it has been a problem since this -- around '69 or '68. That is when the renewal started, I believe.

Q Still no remedy to that problem?

A I don't know if it is being resolved, at this time, or not.

Q Mr. Seals, in the course of our conversation the other day you mentioned that you voted at all Saints Episcopal Church?

A Yes.

Q Is this a predominantly white church?

A Yes, it is.

Q As a black person, have you ever felt any reluctance in voting there or have members of your family or community?

A Well, I don't feel reluctance now, because I guess I have gotten use to the idea because of all of my places of voting. First I voted on Pillans Street at the VFW and now on Ann Street and all of the places I have voted since I have been voting have been predominantly white places and I guess I have gotten use to the idea.

Q Do you think it deters some of the people in your neighborhood?

A I would imagine it deters some in going to a predominantly white place like that.

Q Has the increased presence of black poll workers

made voting in recent years -- made the voting facilities seem more available and attractive to black citizens?

A Yes. I have spoken to some of the people in my area and they did feel that since the poll watchers were mixed that they had more ease and they felt a little differently about going to the polls, because people generally feel that if they go places where they are not many of their kind there is a reluctance about going.

Q One last point. You have been active in your neighborhood for some time and a leader in your community organization and you expressed interest to me in this litigation.

Do you think if single member districts were created in your neighborhood that you might offer yourself as a candidate for City council or City Commission under certain circumstances?

A If it was changed?

Q Yes, sir.

A Yes, sir. I do feel that I would.

Q You wouldn't under the present system?

A No.

Q Why?

A Because it would be very difficult to win and I don't think that I would like to sit myself as a loser from

Q Not all of that being City money? A great deal of it being Federal money, wasn't it?

A Right.

Q And by and large the Mobile Housing Board since it is the recipient of the Federal funds, is subject to the overriding authority of their Federal authorities, is it not?

A Yes.

Q Now, I believe you have told us that you had been to the City Commission one or more times in connection with problems you have in your area; is that correct?

A Several times.

Q Which commissioners have you met with?

A With our present commissioners, I have met with all three.

Q And the previous commission, with whom did you meet?

A Each time that our delegates went before the commissioners, all three commissioners were present.

Q About how many times would you say that your delegation has been down to the City Hall and met with the commissioners since May of 1967?

A At least four times since 1967.

Q And they have been readily available to you to meet with your delegation, haven't they? You had no difficulty in getting heard?

A We had no difficulty at the meetings, no.

Q With the exception of this matter with the park, you have actually accomplished everything that you had sought to accomplish except a part of the area has some problem with drainage?

A The park and the schools, there were two.

Q Well, the schools are subject to Judge Hand's order.

A Well, you see, we were involved in that survey and it was made of the down the bay area.

THE COURT:

I think you can forget the school. That is out of the City's hands on a petition from the black people.

MR. ARENDALL:

Q As to the park, didn't I understand you to say that you now feel that you have enough people down there to actually get built the park that is part of the major plan?

A But it is very difficult to discuss the park without mentioning the school, because it comprises one big area and we were told that the whole area was owned by the housing board, that the school board was suppose to purchase one part of it and the City the other and, to our knowledge, this has not been done. So, it is very difficult to talk about the park and divorce the school when it is one large acreage.

Q Well, let's try to do that, because there isn't

anything, Mr. Seals, that the City Commission can do about that, or even the school board can do about that.

MR. BLACKSHER:

If your Honor please, I object to counsel characterising that point. We will be glad to submit to you briefs providing you what the legal situation is. I understand we don't want to get into it in detail, but I object to that characterization.

THE COURT:

Well, it may be that the position that the City takes in that other hearing, but I think we will have to take judicial knowledge that the City, by itself, cannot do anything. It is subject to this Court's order.

Whatever explanation you want and I am certainly not going to try that case. Thank goodness that is not mine. But the City Commissioners hands -- I think we have to recognize is tied to a large extent by the action of the Court in that law suit.

Now, if you want to show some discriminatory purpose or motive that the City had in that suit, I want you to feel free to do it, so far as it relates to the park.

MR. ARENDALL:

As a matter of fact, Mr. Seals, the City of Mobile doesn't run any schools any where, does it?

A No. The City does not.

Q That is done by the Mobile County School Board?

A That's right, but there is another problem, if I may.

Q Sure. Go ahead.

A The housing board now wants to sell to private ownership the land that was taken for the school site. See, that is another problem, because the land was taken for a school site and now if it is resold for private owners, I think it is unfair.

Q That is the housing board and that isn't the City Commission and that is subject to Federal supervision, isn't it?

A I guess so.

Q Have you made any representations to HUD or HEW?

A Just the housing board.

Q And what response did you get from the housing board?

A The action is still pending on it.

Q They have to take it up with Atlanta first, I think, don't they, and then Washington?

A More than likely.

Q All right. Now, as to drainage, drainage in a whole lot of parts of Mobile, to your knowledge, have problems with drainage, don't they?

A I would suppose so.

Q Are you aware of the on going efforts of the City of Mobile to effectuate a major drainage program?

A Yes, I am.

Q Is it fair to say, then, that you really not only have had access to the City Commission and have been heard by them as to every matter that you have sought to bring to their attention, but that with the essentials of the park to whatever extent the City has control over that, that is the only thing that you haven't gotten what you wanted; is that right?

A Well, in my case, yes.

Q There are, as you said to us, black and white poll watchers at all Saints Church, are there not?

A There are.

MR. ARENDALL:

No further questions.

THE COURT:

Any further questions?

MR. MENEFEE:

No, sir.

THE COURT:

All right. You may come down.

Whom will you have next?

I am going to put Dr. Voyles on as a witness and let him testify and he will be subject to full cross examination. They have his thesis and it speaks for itself.

THE COURT:

Well, he has the right to call anybody that he wants to and limit -- really, now, under the Federal rules, the question of vouching for a witness is about out the window. The Court takes the testimony and weighs it. The old limitations -- we are particularly familiar with vouching as to a witness has certainly been severely reduced and we will limit cross examination and then you can put him on.

JAMES E. VOYLES

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified, as follows:

DIRECT EXAMINATION

BY MR. STILL:

Q May it please the Court, the witness is James Everett Voyles. He lives at 1102 Savannah Street in the City of Mobile. He has a B.S. Degree -- and a M.A. Degree from the University of Mississippi, and a PHD Degree from North Texas State University in Denton, Texas, with the

major in political science.

He is presently employed in his own business, which is known as James Everett Voyles and Associates.

Dr. Voyles, what is your age?

A Thirty-two.

Q You also hold a part-time teaching jobs at Springhill College and the University of South Alabama?

A That was true, Mr. Still, up until May, at which time, I resigned in total from Springhill. I will teach in the fall at the graduate program at the University of South Alabama, assuming it is funded.

Q Would the clerk hand the witness Exhibit number 9, please?

Here you are. Do you have one?

A Is that my desertation, Mr. Still?

Q Yes.

A I have a copy here.

Q Fine. They are all numbered the same, Judge. Would you explain to us what Plaintiff's Exhibit number 9 is?

A It is my doctoral desertation which is entitled "An Analysis of Voting Patterns in Mobile, Alabama, 1948 through 1970".

Q And this was in partial completion of your PHD?

A Yes. That's right.

Q What was the general purpose of the study?

A The general purpose of the study was really to be a methodological statistical study of the voting patterns in the City of Mobile during the years this indicates.

Q What statistical devices or methods did you use to measure voting behavior?

A Are you referring to the Pearson product moment?

Q Yes.

A Yes. I used that as a means of determining correlation between variables in voting.

Q Is this a form of regression analysis?

A Yes, it is.

Q And is it substantially similar to the least squares method of analysis?

A Yes. As Dr. Schlichting testified, the methods that the Plaintiffs used a multiple correlation is based on least squares. This is always a derivative of least squares. The major difference, the Pearson product moment handles only one variable at a time whereas the multiple handles any number of them.

Q They come out with generally the same statistical answers given the same information?

A Yes. Theoretically, at least, if the data was handled exactly the same the results would be exactly the

MR. STILL:

In the bottom of the second paragraph, you make the statement, "The implications appeared to be that identification with the black vote was to be avoided if one was to be successful in local elections. Thus, black electoral influence was virtually deleted in Mobile,".

Now, was that a conclusion of your study?

A Yes. That is basically a conclusion.

Q All right. Wasn't the thesis or the hypothesis that you set out to prove in this desertation that black voting influences in the City of Mobile over the time period you were talking about had decreased and the Republican influence was increasing during the same time period?

A Yes.

Q All right. Did you prove that hypothesis?

A I think I proved very well the question of the black. I am not for sure I did so well on the Republican, although statistically they both proved out.

Q All right. You then again make the same type of statement about black influance in the elections, on page one hundred, I believe, in the bottom paragraph on that page, you make a statement that while blacks seem to be supporting all three winners in 1953 that everybody who won in 1969 did not carry the black wards; is that correct?

A Did not carry the black groups, yes.

Q All right. Is that a conclusion of your study?

A Yes.

Q Is that in support of your hypothesis?

A Yes, it is.

Q And I believe that you stated on page one hundred and seven of the desertation, around the middle of the page that it is better to ignore the black vote than to risk identification with it?

A Yes, I did.

Q All right. Now, what do you mean by identification with the black vote?

A Well, by 1969, Mr. Still, the issue of Civil Rights, race and so on, had become very important, an important issue in Mobile.

Perhaps it reached its peak, but certainly was a strong issue anyway and had been in the '65 race, as well, particularly in '69. What I meant by this was if a candidate got too close to the black vote and was identified as a candidate of the black community he was very likely, in 1969, to find some white backlash to his particular candidacy. This was particularly critical, if you were in a runoff election.

Q Your thesis is not that any person who receives substantial black votes is going to lose, but that that candi-

date will lose if white voters perceive that the candidate is identified with black voters; is that correct?

A Yes. That is basically what it is.

Q So, it is quite possible, under the thesis that you have developed here, for a candidate to receive a substantial number of black votes and still be successful; is that correct?

A Yes. I would have assumed, in 1969, that a candidate could have received a substantial amount of votes in the black community and still have been successful.

Q Now, would it also be congruent with your thesis that a candidate -- if a candidate was identified with the black vote, that white voters might vote against that candidate, notwithstanding how the candidate actually did in the black wards on the same day?

A I suppose that is possible, although we don't have any results of that that I know of.

Q All right. And most of the cases that you studied, didn't the allegation of -- well, the identification with the black vote or with the block vote, as it is called in advertisements, sometimes doesn't that generally take place in a runoff election?

A Yes, The tendency was and this is in the perception part of the tendency was that several candidates would run in the first race which two of them would end up in a runoff.

Since the election we are talking about requires a majority, at which time, in the case of Joe Langan, in particular, his opposition would publish in the newspapers results of various black wards showing that Mr. Langan got a disproportionately large percentage of the black votes and thus identifying him with the black vote and the strategy would be the reaction from the white community to offset the votes Mr. Langan was expected to get from the black area and the perception part came, of course, from the opposition that published this.

Q In Mr. Langan's case, didn't you find in here that in some cases the opponent would use the previous election data against Mr. Langan the first time around?

A No. I don't believe I did, Mr. Still. I don't recall that, if I did.

Q It is just generally restricted then to runoff situations?

A To my knowledge, the only advertisements of that type that appeared within the period of this desertation was in the runoff with Mr. Bailey and Mr. Langan in 1969.

Q All right. Was 1969 a runoff with Mr. Bailey and Langan, or was it just the first election?

A Yes. It was not a runoff. I assume I used the 1965 data.

Q All right. Now, about page seventy of the desertation

you began talking about some black candidates who have run for election?

A Yes, I do.

Q Which black candidates did you study?

A The 1966 race of Dr. Russell who, I believe, was a candidate for the Mobile County School Board and then, I believe, the election of Mr. -- that Mr. Montgomery and Mr. Bell contested, which was a special legislative race in 1969. You might prompt my memory. Did I do the one on the Jacobs race in the desertation?

Q I don't see it mentioned.

A I don't believe I did. Okay.

Q All right. Now, what conclusions did you draw about the chance of a black person being elected at an at large election?

A I don't know that I came to that conclusion. None of these three candidates were successful.

Q Did you run any sort of an analysis about the votes that they received in various wards?

A They received substantially more vote in the black area than they did in the white.

Q Would you look at page seventy-two, please?

You have a statement there, "In fact, the percentage of vote for Russell in each ward corresponded closely to

the percentage of negro voters in that ward."

Is that a conclusion of your thesis?

A Yes, it is.

Q Would you think that that would indicate, at that time, a racially polarized voting situation?

A I think it indicates, in that particular race, that Russell did substantially better in the black area than he did in the white.

Q All right. Does it indicate to you, considering the percentage of vote that he got in comparison to the percentage of black in each ward, that he was receiving substantially negro votes and no others?

A He was receiving substantially negro votes. I am not for sure I can come up with a cause and effect on the statistics. I was not in Mobile at the time.

Q All right. Would the Clerk hand the witness Plaintiff's Exhibit number 53, please?

Would you look at, please, the top of the first page at the results of the City Commission races and this Exhibit has been previously explained to us and I believe you were here, at the time, that the top half of the first page includes the Pearsons R, that is the product moment correlation coefficients run by you for each one of these legislative races -- excuse me, City Commission races for

groups holding race constant, as we say?

A Yes. I compared the low income white groups with the higher income white groups.

THE COURT:

There seems to be some of your notes in this Exhibit. Hand them to him, Mr. law clerk.

MR. STILL:

All right, excuse me.

Q Does this table show only the difference between low white and high white?

A Yes, I believe so.

Q All right. Is it possible to compute, from the table beginning at page one hundred and twenty, the difference between the low black and the low mid-black?

A Yes.

Q All it would be is a subtraction effort, wouldn't it?

A Yes.

MR. STILL:

Your Honor, I would like to show the witness -- we are running out of space to tack it up on the board over there. This is Plaintiff's Exhibit number 56. Take a look at that for a moment.

All right. Plaintiff's Exhibit 56 is a chart showing the differences between -- in the case of the dotted red line,

showing the differences between the low income black and the low income white who voted for the winner.

In other words, that would be the same as the first column labelled "Difference" on page one hundred and twenty, wouldn't it be, Dr. Voyles?

A Yes.

Q All right. Now, the solid red line shows the difference between lower middle income blacks and whites, the percentage voting for the winner, and I believe that would correspond with the last column on page one hundred and twenty marked difference, wouldn't it?

A Yes, sir.

Q All right. Now, the black lines are then computed from the material that you have on this table and the differences are not specifically shown, but the dotted black line shows the difference between lower income blacks and lower middle income blacks that would be comparing the column -- those respective columns and taking the difference between them and the solid black lines show the same thing for whites, which would then take the columns labelled lower white and lower middle white and take a difference between them.

Now, looking at this chart, don't we generally see that the difference between racial groups -- no, excuse me. The difference between income groups remains fairly low from

1961 on, whereas it was much higher in the fifties?

A Yes, it is.

Q Doesn't the chart also show that the difference between the racial groups was about the same as the difference between income groups in the fifties, but that it got much higher into the thirty to forty percent range in the sixties; isn't that correct?

A Yes. That is what it shows.

Q All right. Now, would you conclude from looking at this Exhibit which, of course, is based on the table in your thesis that over the time from 1953 to '69, which is a period covered by your thesis, that the income of the voter has become less important in explaining the difference in turn out than the race of the voter has?

A Actually, we are not talking about turn out. We are talking about.....

Q Excuse me, voting for the winners, I am sorry.

A Yes. We are limiting that up to and including 1969. That is true.

Q All right. Your Honor, this chart includes some data from 1973 that was also presented to us by the Defendants.

We will present this in evidence at a later time once we have gotten that material in.

MR. ARENDALL:

Q In any event, that was not done in your desertation nor has it been done in Dr. Schlichting's regression theory?

A No, and going further than that, it cannot be done at this point. It would have to be done at the time of the campaign while it was going on.

Q While your desertation indicates a very high Pearson's "R" in the Langan 1969 race, did you make a sufficient additional study to form a conclusion as to what actually cost him the election?

A Yes. I made some comments on that in the desertation.

Q Would you express those to us?

A Well, I think the obvious thing that happened to Mr. Langan in 1969 was the boycott in the black area and perhaps the impact of the hurricane Camille, but for whatever factor, the fact that blacks did not turn out in large numbers -- to give you some figures about that, in wards ten, eleven, twenty-two and twenty-three, Mr. Langan received sixteen hundred and ninety-two fewer votes than in 1965. That is fewer in 1969 than he did in 1965.

In wards three, twenty and thirty-two, Langan received three hundred and sixty-six votes fewer in 1969 than he did in 1965, yet his percentage of vote that he got from the black area was roughly the same as what he received in 1965; that is, he received most of it.

black for another type of ward.

So, there is -- that would be forty percent black or a forty-five percent gap in there?

A Yes.

Q We are not talking about smaller increments of vote, escuing the diagram in some way showing a smaller relationship or near perfect relationship on the basis of that?

A Yes. We had a pretty good gap in them.

Q Forty-five percent is a pretty good gap when we are talking about a hundred percent universe, aren't we?

A Yes.

Q Now, the thesis you were testing -- the hypothesis you were testing in this thesis was that black voting power in the City of Mobile had decreased during the period under study.

Now, you found that to be true, didn't you?

A Yes. If you are going to -- yes, okay. How are you going to define voting power in what you are saying?

Q Now, cause and effect is not shown, as you said?

A No, not by the statistical work.

Q All right. Do you have your thesis there in front of you?

A Yes, I do.

Q Look at page twenty-nine, please.

A Okay.

Q Now, toward the bottom third of the page there is a sentence.....

THE COURT:

What page?

MR. STILL:

Twenty-nine, your Honor.

THE COURT:

All right.

MR. STILL:

That reads: "Product moment correlations are mathematical models that determine the degree of association between given variables."

A Yes.

Q Now, you used the term there, "degree of association"?

A Yes.

Q Instead of cause and effect?

A Yes.

Q Now, once you have shown a degree of association between two factors and we have ruled out the obvious anomalies, or the obvious things like shoe size and reading ability, if we are really trying to test something, doesn't that degree of association shown by Pearson's R actually shows us that

the two factors are associated in some way; isn't that correct?

A Yes. It shows association. What it does not show is the reason for this association.

Q Right. And we can, once we have shown the association between childrens' shoe sizes and their reading ability, once we have shown there is that correlation, then we can look at it with our own intelligence and say, well, of course, there is cause, they are both related to age; isn't that correct?

A Surely.

Q When we are dealing with elections, I believe you said you were replicating a study that had been made in Atlanta trying to determine the impact of race and income on voting within the City of Atlanta and, in this case, you did it for the City of Mobile and there are other studies for other areas, aren't there?

A Yes, there are.

Q After we have this statistical measure called Pearson's R we can then look at it with our- own human intelligence to determine whether or not it means anything; isn't that correct?

A Yes.

Q And in writing your thesis you looked at the Pearson's R that you got and you determined that black voting

power had decreased during the period under study, didn't you?

A Yes, I did.

MR. STILL:

All right. That's all the questions that I have.

MR. ARENDALL:

Judge, I overlooked asking one brief question.

THE COURT:

All right.

RECROSS EXAMINATION

BY MR. ARENDALL:

Q If you would, please, turn, Dr. Voyles, to page one hundred of your desertation right up at the top. You are referring there to the Langan election in 1969 and you have a cause that says, "He did not carry a majority in any ward (or group) that was predominantly white.".

Now, should not the words "Any ward" and then the or before the group be deleted and should not the clause correctly say, "He did not carry a majority of any group that was predominantly white"?

A Yes. That is correct. I am surprised they didn't catch that.

Q In the election in which Mr. Langan was defeated,

THE COURT:

When we use voting power, we have to use in conte t with different things, don't we?

A Yes.

THE COURT:

That is one of the problems we run into with statistics. Go ahead.

MR. STILL:

That's all the questions I have, your Honor.

THE COURT:

All right. Who is your next witness.

MR. STILL:

We call Dr. Charles Cotrell.

CHARLES COTRELL

the witness, called on behalf of the Plaintiffs and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. STILL:

Q May it please the Court, this is Dr. Charles L. Cotrell. He lives at 210 King William Street, San Antonio,

the present case, but we will take them up at the time we get to them.

Now, Dr. Cotrell, what background work have you done here in the City of Mobile to prepare yourself for the testimony in this case?

A I examined Dr. Voyles's thesis. I examined the work done by the two statisticians hired by the Plaintiffs. I undertook fairly extensive interviews with politically active persons in Mobile City politics and Mobile County and schoolboard politics.

I read newspaper articles on Mobile politics and visited Mobile, for these purposes, personally three times for period roughly of ten or twelve days.

Q Now, what does the term "voting dilution" mean to you as a political scientist?

A Voting dilution means the cancelling or submergeance of a voting group, an identifiable group of voters. It is usually used in association with at large elections. That is the context within which I have used the term and have seen it used. It suggests that a number of factors have come to play, some historical and some current have converged to bring about an effect which basically, as it were, freezes permanently or makes it significantly difficult for a particular group to express their preferences.

It is associated with a very important dynamic, that is of racial polarized voting, in a context where race has shown to be manifest in elections or in a -- in a context wherein race can become manifest in the elections.

In the particular electoral structure of at large elections in the context of the dynamics of racially polarized voting, racial dilution occurs when, for example, one racial group of a minority numerically or possibly have a majority numerically, but still, in a voting minority faces, in the sense, we could say the hostility of a white majority or a black majority, but faces hostility of a voting majority which basically controls the entire electoral -- election and so on.

So, the dilution occurs when the preference of the minority numerical or the minority occurs when the preferences are no longer registered in the system. In other words, the votes could be cast time and time again, but to no avail.

Now, there are other factors which have been found in behavior in law, but that is the basic dilution notion.

Q All right. Now, what data from Mobile did you examine to decide whether or not voting dilution of black voting strength exists in Mobile City?

A I examined correlations that were presented to this

Court. I interviewed some eighteen to twenty individuals. I heard testimony in this Court for the past two days. I examined what can be called racial campaign appeals and I also examined, as I suggested to you, Dr. Voyles's thesis which has been introduced as evidence into this Court.

Q From this evidence, what is your opinion what is your opinion about whether or not voting dilution of black voting power exists in Mobile?

MR. ARENDALL:

Just a minute. Objection to that. I do not consider that he has stated the facts on which an opinion can be based.

THE COURT:

Well, he is giving a political science view of what dilution is. That is not necessarily the Court's definition of what dilution is, but to develop his thesis or his point, I will let him testify.

MR. STILL:

Have you reached a conclusion?

A Yes, I have.

It is my opinion that black voting strength in Mobile has been diluted and the black voting strength is thereby basically cancelled or negated in the at large structure in the Mobile City elections.

Dr. Schlichting's testimony; is that correct?

A Since approximately one-fifteen on Monday.

Q All right. James Buskey and some other witnesses that we have had have suggested that lower black voter turn out in elections is a residual effect on past discrimination.

Do you feel that you have sufficient evidence to draw that same conclusion here for the City of Mobile?

A I would like to look at more data before I would reach the conclusion that it is simply the residual effect that causes low black participation or low voter turn out. We do, however, have some evidence and I would, among the explanations, lean toward a residual -- the residual impact of exclusionary laws in the past.

We have evidence which shows up to 1965 that there was a fairly massive differential in voter registration and this doesn't necessarily mean turn out, but it is an indicatory.

Secondly, I believe Plaintiffs have introduced some contrast between predominantly white and predominantly black wards and turn out in the sevencies.

The interviewees all estimate that the turn out is lower. So, I think we have some basis to reach a tentative conclusion that there is a differential between black and

white turn out.

As to the residual question, it seems to me that political science offers us, I should say, three possible explanations. One of them would be that black voter turn out would be the result of past electoral structures. Ira Sharshansky (sic) in his book on regionalism in America, Kenneth Vines -- I am sorry, Jacobs and Vines and their book on American State Politics, suggest that electoral structures do, indeed, have a real impact upon participation rates and if a group of citizens have been excluded historically, I think we can reasonably expect that legacy of exclusion to hang on, as it were, as a residual effect in terms of their voter turn out. That is one explanation and that is the explanation to which I lean.

Q What are the other explanations?

A A second explanation would simply be that black voters in Mobile, as blacks are apathetic, something indigenous in the group. I don't believe I would honor this as a political science explanation. It gets into the national character studies that have been fairly discredited and yet a third explanation would suggest that it is in the anals of voting behavior literature a third explanation would suggest that lower income people turn out less and that

there is an overlap between black voters and lower income people.

Of course, we had testimony yesterday which showed that in spite of the economic levels, as it were represented in Dr. Voyles's thesis, the differential between white and black voters and turn out in the sixties maintained. Thus I would return to my original point, the residual explanation seems to have credence.

Q All right. Let's go back over a couple of these points for a moment. As regards the second point, you said it might be something indigenous in the black character and then you said that deals with the national character studies which have been pretty well discredited?

A Well, let me elaborate on that. I don't want to make this a vowel, but it could be a possible explanation, as I see it. During the thirties and forties a number of studies were contrived concerning the authoritorian or regimenting might of the German people, tracing it back to some pressism regimentation in the nineteenth century. To impute to a group, a racial group to an ethnic group or to impute to a national group characteristics such as in the area of the country that I am from, Mexican-Americans are simply lazy, is dangerous stereo-typing and I don't see any evidence which suggests that there is anything indigenous

in black voters in Mobile as a group that they would suggest that they don't turn out.

Q All right. Now, have you examined any evidence or conducted any interviews about the difference between voter turn out and multi-member elections or at large elections and single member district elections which we have here for the legislature?

A Well, I have, in the context of San Antonio, one piece of evidence we have here appears to be the high degree of black voter turn out in the single member district, House district ninety-nine; that is John LeFlore's old seat, wherein, I believe, six candidates offered themselves for office and there seemed to be a response among black voters to that number of candidates and to the possibility of electing a black to -- or a person from that district to the legislature.

I have also compared, I would say this very briefly, I have also compared the effects of the same phenomenon in the Bear County, Texas, the original authority in the White decision.

MR. ARENDALL:

Just a minute.

THE COURT:

We are not going into what you found out there. You

may use the basis of any studies you made in drawing conclusions and facts you have found in this one. I would suggest you do not interject those other cases into it.

MR. STILL:

You have heard testimony in this Courtroom from several persons saying that black people generally have not run for at large elections, because they felt that they did not have sufficient voting power to win them and I believe Mr. Buskey testified that he would not run in an at large election, because he could not win such an election.

Have you been able to gather any sort or make any sort of conclusion on the basis of the testimony that you have heard here, the interviews that you had on the other evidence that you looked at as to the participation as candidates by blacks in an at large election system versus a single member district system?

A The political science language for this would be the recruitment of candidates and based on the testimony I have heard, and based on the interview sources, I would have to conclude that black voters -- black candidates would basically -- potential candidates would be discouraged from running in at large situations and the view expressed to me and in this Courtroom is that there is a high probability that we won't win or it is impossible or, as one person

said, suicide, in the at large structure and the way in which this would be talked about would be a certain discouragement in the incentive to offer one's self or through association gather about political followers and hence run for office. So, my opinion would be that a discouragement factor is at work.

Q All right. You have heard the question that his Honor asked the previous witness this morning about the voting power of blacks between the time that they are thirty percent or so of the electorate, and the time that they are fifty percent of the electorate.

Do you agree with the conclusion that Dr. Voyles reached that as long as racial polarization occurs that blacks will not be able to win at large elections?

A Yes, I do. I would like to comment on that, if I might.

Q Go ahead.

A Judge Pittman formulated the hypothesis, the hypothetical in a way in which we can ill afford to ignore. He suggested that in the hypothesis that as black voters in this thirty-five percent population figure gained strength in Mobile there is a tendency or potential to react among -- apparently to react to that, as it were, as a threat. So, he concluded the logical conclusion would be that until

blacks were in the majority in the at large structure you really couldn't expect their preferences to be registered equitably.

I think that goes to a very realistic view of this particular rank or percentage rank of black population in Mobile and I would add one thing to it. It is quite possible that that could be expressed, that resistance, as it were, to black, increased black voter registration, could be expressed in a manifest way or it could in public opinion terms remain latent, as it were. We wouldn't know about the existence or possibly existence of racial campaigning and appeals to it until a black candidate basically a qualified candidate offers himself for office and, in this context, I think we would be back to our probability of failure of success in the at large context. It is a very crucial way, it seems to me, to understand dilution in the Mobile context.

Q All right. Now, that deals with black candidates running for election.

What about the situation where it is not a black candidate running for office, but it is a white candidate supported by the blacks. Can the blacks occupy a pivotal position thereby enhancing their voting power in the present system?

A Well, Dr. Voyles's thesis and this testimony suggests that the black identification -- identification with black voters, as he calls it, is a kiss of death. I think dilution works whether or not there would be a black candidate or a white candidate openly and closely associated with the black interests. We had a very esteemed citizen of Mobile yesterday in the Courtroom, Mr. Joe Langan, and I think his case and his election in 1969 speaks to that point.

Indeed, in terms of the pivotal vote notion or voting power, as Judge Pittman framed it.....

THE COURT:

I was using a term that the witness used. I was trying to clarify what he meant by voting power.

A Well, let's stay with counsel's use of voting power or the witness's use, as a term. What this means is a white candidate would have to approach the black community, as it were, looking over his or her shoulder and hoping not to evoke any kind of intents or close identity or racial identity that would, in turn, cause what we would loosely call a back lash among white voters. That formulation, it seems to me in both the terms of discrediting the pivotal vote notion and also in terms of this increasing voter registration related to racial polarization is a very

inciteful way to look at this, the Mobile situation.

THE COURT:

Now, I am not exactly sure just what you said. Do I understand you to say that it is dangerous to look at the increase of black voting power as minimizing their effect, just because it increases backlash or are you saying something else?

A No. We had two parts of it, your Honor, two parts of the analysis, and what I am suggesting is that sort of a vicious Catch-22, as you might hypothesize on, could occur if racial polarization would indeed increase as blacks become a voting threat.

THE COURT:

If I understood you correctly, you are saying that racial polarization may increase, but it does not necessarily decrease their power, because they have some power on the necessity of other people to seek their votes?

A No. That is the second point I was addressing. I suggest their power is debilitated in the sense we use power.

THE COURT:

I understand.

A Because of the racial context within which they must

be approached as a voting group.

THE COURT:

What was the danger? I understood you to say that there was some danger in viewing that.

A Here is the danger, your Honor. It seems to me, as far as equitable or equal black voting strength, we have seen introduced into evidence here the newspapers and other ads that show black wards with "x's" through them and to be saddled with that black vote, to openly court the black vote and black interest, could indeed be very problematic for a candidate. He must approach them looking over his shoulder to see how that reaction is received by the white voters and that is the very mechanism of racially polarized voting or the potential of racially polarized voting that causes the problem in dilution.

Q In other words, you agree with Dr. Voyles's statement that it is a kiss of death to be associated with the black vote?

A Yes, I do.

Q For a white politician?

A Yes, I do.

Q Now, all of this hypothesis has been based on the idea that there is and will continue to be racial polarization.

Now, have you found, from the evidence presented in

this case, particularly the computer analyses, the regression analyses, that there is a racial polarization of voters within the City of Mobile?

A Yes. I have found that to be the case.

Q Do you find that it is diminishing, at the present time, or increasing or staying about the same?

A I wouldn't respond to the question in terms of more or less or whatever. I would suggest to you that racially polarized voting exists, that it may be difficult to determine fully that that exists in the '73 elections, although you do have some correlations. The interviews suggested that neither of the candidates in the Greenough -Bailey race were particularly favored by a great numbers of black voters, that is, identified with black voters. This was the interview source and I guess more importantly the notion of race still seems to be here and it seems that quite possibly it could be evoked as an open issue, unfortunately, in 1976 as it was in 1969 in terms of the racial campaign ads. Indeed, testimony suggest that it was evoked in 1974. So, racial polarization still persists in the seventies, in my opinion.

MR. STILL:

Thank you. That's all the questions I have.

MR. ARENDALL:

Your Honor, give me about five minutes to look over

MR. ARENDALL:

Q Dr. Cotrell, did I understand you to say awhile ago that you purported to find some racial polarization in 1973 election for the City Commission?

A I would have to see the correlations on the Greenough - Bailey race, but I believe the correlations -- I am not sure whether it was statistically significant or not.

Q Well, I thought you based your opinion on having seen the correlations. I want to call your attention to the fact that it was thirty-five -- the R square was thirty-five and that is well under the trash range,isn't it?

A Well, I also suggested to you to verify that the interview sources suggested that Greenough and Bailey, unlike a person like Langan, were not overly identified in the black community as representing black interests.

Q Do I understand you to say that black candidates or some white candidates have shunned the black vote?

A No. I said white candidates in the context of racially polarized voting would probably have to approach a voter group like a black voting group in Mobile very cautiously and their approach and their strategies would have to avoid what Dr. Voyles had described as the kiss of death.

Q And can you give me any candidate for City Commission

in recent years that have shunned the black vote?

A I wouldn't be qualified to suggest that this candidate or that candidate in the closeness of a campaign headquarters developed the strategy or that. I am simply suggesting that that is an explanation of the way campaigns are waged, recognizing that the black voters might make as much as twenty-five or thirty percent of the electorate.

MR. ARENDALL:

No further questions.

THE COURT:

You may examine him.

REDIRECT EXAMINATION

BY MR. STILL:

Q Dr. Cotrell, I have a couple of questions, please.

Would the Clerk hand Plaintiff's Exhibit number 4 to the witness, please.

THE COURT:

Before you do that, let's take about a fifteen minute break.

(RECESS)

THE COURT:

All right. Mr. Still,

MR. STILL:

MR. MENEFEE:

Mr. Sylvester Williams.

SYLVESTER WILLIAMS

the witness, called on behalf of the Plaintiffs, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mr. Sylvester Williams, forty-eight years old and lives at 350 Adams Street, Mobile. He was born in Dallas County and lived in Mobile County since 1940. Finished the third grade. He is on a labor committee and a civil rights committee for the non-partisan voters league.

He is treasurer of the shipbuilders union and works at Alabama Dry Dock and Shipbuilding Company.

Is that correct, Mr. Williams?

A That's right.

Q Mr. Williams, how long have you been associated with the non-partisan voters league?

A Since 1960, around 1960.

Q And when were you registered to vote in Mobile?

A In the late sixties.

Q Prior to that time, had you attempted to register to vote?

A Yes, I did.

Q About how many times?

A About six or seven times.

MR. ARENDALL:

I object, if your Honor please. I think we have gone into past discrimination.

THE COURT:

Well, I have told them that since 1950 that there was a stipulation up until 1950, but I have told them that since that time -- that is as far as the stipulation went. Go ahead.

MR. MENEFEE:

I am sorry. About how many times did you try to register?

A About six or seven times.

Q Would you describe some of those efforts? Did you go down with other people?

A Well, we went down with other peoples, Moss Johnson and several others, but we couldn't make it.

Q Were you allowed to take the test?

A Well, we tried to take the test, but we never could pass.

Q What sort of questions were they asking you; do you remember?

A Well, it has been a pretty good while ago and it is hard to remember.

THE COURT:

Was this prior to the voting rights act of 1964 or '65?

A Yes, sir.

THE COURT:

I will take judicial knowledge that the board of registrars presented me with a list of questions prepared and I couldn't answer some of them. They called me and asked me what were they to do with them -- not what they could do with them, but did I know the answers and to some of them I didn't.

MR. MENEFEE:

This Mr. Moss Johnson you mentioned, was he active in the area in trying to encourage blacks to register to vote?

A Yes, he was.

Q How did he go about his operation?

A Well, he would -- he was working at the yard there

and he would ask them. you know, to take them down to get them registered or to vote.

Q Would he take a bunch of his co-workers?

A Yes, sir.

Q Was he very successful in this effort?

A Well, he was taken down there, but he wasn't successful.

Q He kept trying?

A Yes, sir.

Q What was .....

MR. ARENDALL:

What time frame?

THE COURT:

Yes, give us the time.

MR. MENEFEE:

Could you give me some estimate on this time?

THE COURT:

Within a period of time -- did the six times occur between what years?

A I believe this was in the fifties, I believe.

MR. MENEFEE:

Did they extend into the sixties? Did you attempt to register in the early sixties?

A We tried it in 1960, but we wasn't successful until

after the voting rights act passed.

Q Okay.

THE COURT:

When was the first time and when was the last time?

A I believe it was the early sixties, I believe, the last time.

THE COURT:

And the first time?

A As close as I can get to it, I believe somewhere in the late fifties.

THE COURT:

All right.

MR. MENEFEE:

Q Since you have been registered to vote, have you regularly voted?

A Yes, sir. Since I have become a qualified voter I have missed one time voting.

Q When was that?

A This past .....

THE COURT:

I don't think that is necessary.

A This past May.

THE COURT:

Let's get on to more meaningful things.

Do you remember demonstrations in front of City Hall one time in which Mr. Langan, I believe, came out?

A Yes. Mr. Langan.

Q What action did Mr. Langan take, at that time?

A Mr. Langan come out there and asked them what did they want and broke it up and told them whatever they wanted or whatever problems they had to come down to City Hall and see them and he would get together with them and work their problem out.

THE COURT:

Again, I express reluctance about cutting off a line of questioning, but I think this area is fairly well established and nobody really disputes what happened. If it comes up, I will let you offer it later.

Just in the interest of moving this case along in the areas where there seems to be no great dispute, let's don't whip it to death.

MR. MENEFEE:

Over the years, the non-partisan voters league has endorsed a fair number of candidates; is that correct?

A That is correct.

Q How do you go about this process candidates come in and are interviewed? Do you endorse a candidate in every race?

A Well, most of it.

Q How do you make a decision? Suppose you have two candidates of which are very attractive, very good?

A Well, we have what they call a screening committee, and the screening committee talks to them and the screening committee will make a recommendation back to the membership and what candidate they choose they are what they call picking the lesser evil.

Q Are you often faced with this situation of picking the lesser of the evils?

A That's right, pick the lesser evil.

Q Do you think all of the candidates endorsed by the non-partisan voters league that have been elected have treated blacks fairly?

A No.

Q Why do you think they may not have treated you fairly?

A Well, in one way, seeing that the County hasn't.

Q Why do you think they don't treat you fairly?

A While the County come in the black community and promise they are going to do this for them and they give the blacks red dirt and oyster shells on the roads.

Q Let's see, you were a close associate of Mr. John LeFlore, I believe?

A Yes, sir.

Q Do you know if Mr. LeFlore had, over the years in behalf

of the non-partisan voters league, written police commissoner Doyle about problems many times?

A Well, he had written to Mr. Doyle numerous of times.

Q What was the feeling of you and John LeFlore and members of the non-partisan voters league about the response?

MR. ARENDALL:

If your Honor please, he is being asked to testify to mental attitudes of a dead man and others and I object to the question.

THE COURT:

No. What the black community, what their feeling about it is, and he is familiar with it and his own and I will let him testify to it.

A Well, Mr. LeFlore, he wrote to Mr. Doyle several times and.....

THE COURT:

They didn't ask for details. The question was, what was the feeling?

A We felt like Mr. Doyle didn't give, not only to Mr. LeFlore, but to the black community, what this -- he didn't give the black community good representation.

Q Do you remember reading or hearing of statements of Mr. Doyle being tired of John LeFlore?

A Yes, sir. I believe he said that on T.V. and also

LeFlore was -- I don't know whether he talked to Mr. Doyle on this particular incident, but I believe he was trying to get in touch with Mr. Doyle on this killing incident, this Cecil McMillan case.

Q Mr. LeFlore had a good bit of difficulty in getting in touch with Mr. Doyle?

A I would say he did.

Q Mr. Mims is in charge of public works and oversees the garbage workers, I believe?

A Right.

Q Was the non-partisan voters league or you involved in this garbage strike? Did you follow that fairly closely?

A Well, some, we did.

Q And did you think that Mr. Mims was easy to get in touch with and deal with on this matter?

A Well, some of the people that worked for the City say he wasn't.

Q Mr. Mims come into the black community very much?

A Well, he come in there, like most politicians, when election time comes.

Q Do you see much of him otherwise?

A No.

Q Do you think the City Commission generally treats blacks fairly?

A No.

MR. ARENDALL:

No further questions.

MR. MENEFEE:

That's all, your Honor.

THE COURT:

You may come down.

Whom will you have next?

MR. MENEFEE:

Leonard Wyatt.

LEONARD WYATT

the witness, called on behalf of the Plaintiffs, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mr. Leonard Wyatt, forty-three years old, lives at 473 West Creek Circle in Mobile. He is married and has three children. Attended Springhill College for three years. He was born in Mobile County and has lived here for the past twenty years. He is in the real estate business,

a member of the Chamber of Commerce and board of directors of the Salvation Army.

Is that a correct statement, Mr. Wyatt?

A That is correct.

Q Mr. Wyatt, would you tell the Court what your political experience amounts to? Were you a candidate this passed House ninety-nine election?

A Yes, sir.

Q Have you been active in other political campaigns?

A Not as a candidate, but in support of candidates.

Q In recent years, who were they?

A I have not solicited. I have actively supported people that ran for public office in terms of being in favor of their candidacy.

Q I see. You have not worked, actively worked, then, in any other campaigns?

A No, sir.

Q Mr. Wyatt, why did you decide to run for vacant House ninety-nine seat?

A I felt, first of all, the need to render some type of service to the community. I felt iminently qualified to hold that position and that is basically it.

Q Give me a ballpark figure of how much money your campaign cost you.

A Approximately four thousand five hundred dollars.

Q Were you able to go around the community and shake a lot of hands and pass out literature?

A Yes, sir.

Q Did you make the runoff?

A No, sir.

Q Why had you not sought political office prior to this, Mr. Wyatt?

A I never envisioned the possibility of winning before.

Q Did House ninety-nine present an attractive possibility for winning?

A It prompted the possibility for winning, based on the fact it was confined to a district in which I lived and in which I could move freely and meet most of the people who would be voting.

Q Mr. Wyatt, would you consider running for the Mobile City Commission in the present at large elections?

A I doubt it.

Q Why is that?

A First of all, I would have to be realistic in terms of the cost factor, the probability of raising enough money to support that kind of campaign.

The money would not probably be forthcoming and the other thing would be that generally these elections seem to

get wound up, some how, along racial lines and I would have to look at the numbers and kind of be overwhelmed by that.

Q Okay, sir. Mr. Wyatt, do you have within the black community -- there are a number of organizations that endorse candidates such as the non-partisan voters league and the voters registration organization that are two of them. Can you give us your opinion on the influenceof the non-partisan voters league endorsement within the black community?

A Of the non-partisan voters league?

Q Yes.

A I think they probably affect approximately twenty percent of the black community. I don't think they are as effective as they have been. I think their impact on elections is diminishing somewhat, but they do have some effect.

Q And how about -- how are the other endorsing organizations such as voters registration organization, are they very effective?

A I have no idea. I only heard of the VRO when I was a candidate and happened to be interviewed by them.

Q Mr. Wyatt, what sort of -- during your campaign, what sort of complaints and problems did the voters bring up with you? Did you hear many issues raised, community problems?

toward ten in terms of going out in the community or they were at the other extreme on being down, being very vocal against the people in that community, so that generally speaking people would have voted whether they had endorsements or not and those votes would have been lopsided.

Q All right. You are telling us then that you think the lopsided vote in ward ten was the product of the individual choice of voters?

A I am saying that the attitude of candidates when you talk about ward ten and that point in time I am saying the attitude of candidates toward candidates in the black community dictated, for the most part, how those people voted.

Q Now, Mr. Wyatt, you have spent many hours in City Hall, haven't you?

A Spent a few.

Q You are in the real estate business, aren't you?

A Yes, sir. That is correct.

Q You have been down there on many zoning matters, haven't you?

A A few.

Q You have spent many hours with Mr. Mims and you have met with the other -- all three Commissioners, haven't you?

A All three Commissioners.

Q Never had any difficulty getting access to them, bearing in mind,of course, the fact that they have a few other things to do.

You have ready access to the City officials, don't you?

A Yes.

MR. ARENDALL:

No further questions.

REDIRECT EXAMINATION

BY MR. MENEFEE:

Q Mr. Wyatt, Mr. Flannagan received the endorsement of the non-partisan voters league. Did it appear that he spent a good bit of money and waged an active campaign? Did he run a hard race?

A He ran a race and spent a good deal of money, based on what he produced. I have no way of knowing that for sure.

Q Does the fact that he ran so poorly against Mr. Buskey indicate anything about the strength of the non-partisan voters league endorsement?

A I would think that there are more independent thinkers within the black community today than say in the past, which would have diminished their effectiveness.

Q Mr. Wyatt, being in the real estate business, I suppose you have been around the City a good bit.

Do you have an opinion as to whether or not black neighborhoods that you have worked in receive less equal treatment in regard to municipal services than white neighborhoods?

A I would think that black neighborhoods have received less equal treatment than whites in terms of parks, playgrounds, recreational buildings and so forth.

Q Mr. Wyatt, the access that you have had at City Hall, was that in regard to real estate matters or in regard to political matters?

A Basically, in regard to real estate matters.

MR. MENEFEE:

No further questions.

RECROSS EXAMINATION

BY MR. ARENDALL:

Q Have you ever sought access to the City Commissioners on political matters?

A I may have. I don't recall a specific thing.

Q In any event, you can talk to them and nobody says that we can only talk about real estate matters; is that right?

A That is correct.

Q If you want to go down there and discuss the presidential election or the local elections or a political problem you are satisfied you can speak to Mr. Mims and Mr. Doyle or Mr. Greenough, aren't you?

A Sure.

Q Now, you haven't really made any study to determine whether or not there is a reasonable basis for the location of the various parks, playgrounds and recreational buildings in Mobile?

A No. I don't have to. Making a study would not be a thing I would normally do. Observation tells me a lot of things. Observation tells me, for example, that the park at Sage and Dauphin, for example, is an excellent place.

Observation tells me that the park where Hank Aaron grew up and played as a boy at Hamilton and is willfully neglected. It tells me the park in Plateau, which was, in fact, given to the City by a member of the community is just now in the process of having something done. I don't have to make a study to determine what is being done for one community as to another.

Q You mentioned Sage, Dauphin and the park at -- the Kidd Park in Plateau?

A Yes, sir.

Q Mr. Smith, have you ever been to any meeting at the City Hall?

A No, sir.

Q Have you ever talked to any of the current City Commissioners?

A Yes, I have.

Q Which one?

A I talked with Mr. Mims and I talked with Mr. Doyle.

Q Is that down in their offices or where?

A In their office.

Q As a matter of fact, you saw Mr. Mims about some repairs to Bellsaw Avenue and it was patched after that, although it wasn't re-paved, at that time; isn't that right?

A He directed me to the working committee or whatever they call it.

Q So, you were able to see him when you wanted to see him?

A Yes, I was.

Q And the street got patched, didn't it?

A That's right.

Q And you have talked with Mr. Doyle about police matters on occasion, haven't you?

A Well, involved with myself.

THE COURT:

took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q State your name and address, please.

A Dan Alexander, 3667 Claridge Road, North.

Q And your present employment?

A I am an attorney.

Q And you are also presently a member of the board of school commissioners of Mobile County?

A That's right.

Q How long have you lived in Mobile County, Mr. Alexander?

A All of my life.

Q Would you describe briefly to the Court your involvement in politics in Mobile County?

A I have been involved in politics for some time. I ran for office the first time in 1966 for the Democratic executive committee of Mobile County.

I ran for delegate to the Democratic convention in 1968.

I ran for the state legislature in 1970. I also in 1970 ran for re-election to the county executive committee in the State Democratic executive committee.

A In my particular campaigning?

Q Yes.

A Only in '74.

Q And that was when you ran against Mrs. Gill?

A That's right. Along with four others.

Q And in your opinion does the presence of a black candidate in the race in and of itself inject the racial issue into the campaign?

A Well, you know, to the point that a black in the race would normally be expected to get the majority of the black vote.

Q To the extent of what, sir?

A That you would normally expect the black candidate to get the majority of the black votes.

Q And the white candidate would not normally expect to get much of the black vote, is that it?

A That's correct.

Q What about what opposition to the black candidate? Would the converse be true in terms of the majority of the white vote going to the white candidate?

A I think that you can say that a white would be expected to get a majority of the white vote, yes.

Q Would the Clerk show Mr. Alexander Exhibit 92.

The Clerk is going to show you, Mr. Alexander, a

copy of the school board minutes which contain a statement by you concerning this most recent election where you were opposed by Mrs. Gill.

BY THE COURT:

Do you want this on the record?

MR. BLACKSHER:

No, sir.

THE COURT:

Let's go off the record.

(OFF RECORD DISCUSSION)

THE COURT:

Back on the record.

MR. BLACKSHER:

Q On page twenty-three of the minutes you say these aren't the verbatim minutes of the meeting?

A That's right.

Q Regular meeting of the board of school commissioners, Mobile County. Held in the board room of the Barton Acamdemy Building on Wednesday, October 8th, 1975 at ten, A.M.

On page twenty-three, Mr. Alexander made the following comments. He thought it was hard to argue with the logic of having single member districts. That it was hard to argue with the logic of all the board members representing the same people County wide as opposed to each of the board

members representing a smaller area. That obviously Kane Kennedy offered the bill because of the desire to have black representation on the board. The political realism was that a black presently would not win a county wide race in this county.

You were on public record as taking that position?

A If I might explain, Mr. Blacksher, the minutes of the school board, the verbatim minutes, or the verbatim tape of the school board is our official record.

THE COURT:

Is that essentially what you said, Mr. Alexander?

A Yes, that is not a verbatim statement.

Q But that is substantially it?

A That is substantially it.

THE COURT:

That is the views you expressed?

A Yes.

Q You still agree with those views?

A Yes.

Q Would you express a similar view with respect to black persons running in the City wide elections?

A That they can't be elected City wide?

Q Yes.

A Of course, the proportion of blacks and whites was

considerably different in the City than it is in the County.

Q How different is it?

A I am not real sure.

THE COURT:

Assuming there is a thirty percent black voter representation as opposed to a seventy percent white representation in the City, what would be your opinion?

THE WITNESS:

It would be my opinion that the blacks would have difficulty winning in the City wide elections.

Q And you have expressed the view that there is a need for a single member districts in the context of Mobile school board, is that correct?

A I don't know whether I said there is a need, but I said I was not opposed to that view point.

Q All right. Mr. Alexander, are you aware of the legislation that was passed in 1964 that set up a mayor council form of government that could be adopted by the City of Mobile and was put to the voters in 1973?

A I am vaguely aware of it. I am not sure of those dates.

Q Were you active in Mobile politics in 1964?

A To a very limited extent. I had one congressional race.

A To the best of my ability, yes.

Q What percentage of the school children in public schools of Mobile County are black?

A I suspect forty-five percent at this time.

Q Do you consider that there are in the normal voter's mind different considerations applicable to the question of for whom they shall vote in school board elections from those involved in that determination as to the person for whom they will vote in the City Commission elections?

A I would think so. There is a lot more interest in a City Commission race than in a school board race.

Q Normally, aren't the school board races fought out on claims of who is and who isn't very interested in school children and desirable of giving them good education and things of that sort?

A Yes.

Q And in City Commission races hasn't it been the practice over the years for various candidates to try to tout themselves as good, experienced businessmen, successful in the management of enterprises and things of that sort?

A Along with considerable other claims.

MR. ARENDALL:

No further questions.

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mr. John Randolph. He is sixty-one years old. He lives at 377 Bay Bridge Road in Magazine, Plateau area. He is married and has three children. He attended high school and received a diploma in air conditioning and refrigeration. Mr. Randolph has lived in Mobile County for fifty-seven years. He is the owner of Randolph Variety Store. He is a trustee for the First Hopefield Baptist Church. He is a third degree mason.

A That's right.

THE COURT:

Is your residence in Mobile?

A Yes, sir.

MR. MENEFEE:

Q Mr. Randolph, at the present time do you have a neighborhood civic club or organization?

A Yes, we do.

Q What is the name of your organization?

A It's the Plateau Progressive Civic League.

Q How long has that been in operation?

A Approximately two years.

Q I see. Prior to that, were there other organizations in the neighborhood that worked with civic problems?

of seven hundred feet or are there some instances where it is greater distances?

THE WITNESS:

Some instances is greater distances.

THE COURT:

Seven hundred feet is the smallest distance? I am trying to get a range of distances on the street that do not have fire hydrants available to them.

THE WITNESS:

I would say it averages around seven hundred feet.

THE COURT:

All right. Proceed.

MR. MENEFEE:

Q Mr. Randolph, I believe one time you mentioned some instances to me of drainage problems being so bad that it was washing bodies out of a neighborhood cemetary there, do you remember that?

A Yes, it has gotten that bad.

Q Before you go on, would you tell me when this was occurring; if this was in the last couple of years that you had this type of problem?

THE COURT:

How long ago did that occur?

THE WITNESS:

Oh, I would say within the last three years, I would say that. Between the last three years. The water that comes from the Plateau area crosses Bay Bridge and it crosses the Bay Bridge cutoff. It passes along the line of the Plateau Cemetary and that is the area that we have been able -- we have tried to get cleared up when it crosses Tenth Street. That is where it is cut off and it backs up there and causes quite a bit of damage to people who live along that area in that particular spot.

MR. MENEFEE:

Q Mr. Randolph, I believe you also told me that one of the major concerns of the neighborhood has been the park and recreation facilities. Would you describe the history behind that problem?

A Well, we were interested in a park, and of course, there was a portion of land donated to the City of Mobile for parks. And it has approximately two acres, I imagine, two and-a-half acres. We felt that that was inadequate to serve the community. And we consulted the City Commission on this and we was told to try to find a more suitable site.

Of course, we proceeded to try to do the same. So, at that particular time we were told that there was approximately a hundred and twenty-five thousand dollars available to purchase a suitable site. And of course while we

was looking for a suitable site, then we was told that the hundred and twenty-five thousand dollars had gotten lost in bureaucracy or something. I don't recall whether they used that term or not, but it got lost. So we had to stop there.

We had hoped to have some type of recreation that would give us a year around recreational facility out there instead of just summer activities and everything is closed down.

In this particular ward out there, ninety-nine four, there is approximately ten thousand or more residents in that area. And certainly a space of one or two or three acres in our judgement cannot accomadate that many children or older people, too, for that matter. That won't give them the recreational facilities that we require.

Q How long has the neighborhood been seeking these recreational facilities from the time that you are talking about?

A We are talking about a period of seven years.

Q Has the neighborhood been active in making requests to City government to help them with all of these problems that you have talked about, the drainage, the streets, the hydrants, has this been a continuing matter over the years?

A Yes. I am sure the records will show that they have been consulted. As it relates to these previous --

Q Has there been previous meetings with the City government and the Commissioners during this period of time?

A Well, I would say there has been a number of meetings down there trying to get some of these things corrected.

Q Now, do you think that they have treated you fairly over the years, Mr. Randolph?

A No, I don't think so.

Q What did you get out of these meetings with the City government?

A Well, as the saying goes a lot of promises at election time and that is just about it.

MR. MENEFEE:

That is all your Honor.

THE COURT:

You may cross him.

CROSS EXAMINATION

BY MR. ARENDALL:

Q Mr. Randolph, did you live in the Plateau area in 1968?

A Yes, sir, I did.

Q Did I understand you to say that in the course of your interrogation by Mr. Menefee that the streets were all paved out in that area?

You told that gentleman that, didn't you?

A That's right.

Q Do you happen to know whether the following streets were not paved as of August 13th 1968; Greens Alley, Woods Lane, Adams Lane, Jones Lane, Edwards Avenue, Brian Street, Semmerland Lane, Josie Lane, Wallie Lane, the east end of Edwards Street, the east end of Summer Street, the east end of Bay Bridge Road and east part of Front Street?

Were they all unpaved as of 1968?

A I would say so, yes.

Q So, there has been some improvement in street pavement in that area since 1968 has it not?

A It has.

Q You mentioned improvement in the lighting, too, haven't you? The lighting?

A Oh, yes, it has been some improved.

Q Now, as a matter of fact you have known Commissioner Mims for years, haven't you?

A Quite a few years.

Q You have known Mr. Doyle, also?

A Quite a few years.

Q Do you happen to know Mr. Greenough?

A Not as well as I know Mr. Doyle and Mr. Mims.

Q But you have met with Mr. Doyle for example about

traffic and other problems in the Plateau area, haven't you?

A I have.

Q You have no difficulty getting him to meet with you and consider those problems, did you?

A No, I didn't.

Q You didn't get everything you asked for necessarily, but you were able to get a meeting and consideration, weren't you?

A I was able to get the meeting.

Q Now, what was it that you asked Mr. Doyle to do that wasn't done?

A Well, there was one thing in specific that we haven't or we are but we haven't -- we have been having trouble with police protection in that area. We feel like that coverage of patrol is too large in order to give adequate protection when needed.

THE COURT:

In other words, you mean that they cover too large an area?

A Yes.

THE COURT:

You don't mean that there are too many of them out there?

A That's right.

They cover too large an area. For instance, sometimes when we call a policeman for that area he could be in what they call blackjack in Saraland avenue -- in fact I have called a number of times when my -- especially when my alarm would go off in my store and I have timed it and sometimes it takes approximately thirty minutes or more for a policeman to arrive on the scene.

MR. ARENDALL:

Now, Mr. Randolph, I don't want to interrupt your account of this, but let me ask you this. Do you happen to know how the city determines the number of patrolmen to be assigned to a given area of the city?

A I don't know that.

Q Then you do not know whether or not they keep statistics on the incidents of crime and determine the number of people that patrol that area on that basis? You don't know anything about that?

A No.

Q You just know that you are not satisfied with how long it has taken and what you consider to be an adequate coverage; isn't that right?

A Right.

Q Now, as to Mr. Mims. Have you ever met with Mr. Mims about any of these area problems that you have talked about?

A We have.

Q When you say we, you are talking about this organization that you had?

A Well, yes, I can say we or they --

Q You have had meetings with Mr. Mims before for your Plateau Progressive League was formed, didn't you?

A Oh, sure.

Q And you had access to him and consideration by him of things such as paving and street lighting and so on, haven't you?

A Yes.

Q And do you happen to know whether the fire underwriters, or whatever they are called, were the people that established the standards for location of fire hydrants?

A No, I don't know that it is required in that area.

Q Now, who is this large land owner that you refer to out there?

A Meaher.

Q Who?

A Meaher.

Q That's Mr. Gus Meaher's family, isn't it?

A Yes.

Q How many acres do they own out there?

A Well, I would say in the corporate area of Mobile

county region and this was the survey of Mobile.

THE COURT:

General planning agency authorized by whom?

MR. BLACKSHER:

State law, your Honor. These regional planning agencies took the place of what used to be councils of local government. They are authorized for planning regions which are set up here in Governor Brewer's administration and they generally have representation and get money --

THE COURT:

I just wanted to know from what source it comes.

MR. MENEFEE:

The next witness is Mr. Austin Pettaway.

AUSTIN PETTAWAY

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Would the clerk hand Mr. Pettaway a copy of Plaintiff's Exhibit 91.

Mr. Pettaway, take a look at those papers there.

MR. ARENDALL:

Let me look at this Exhibit 91, also.

MR. MENEFEE:

This is Mr. Austin Pettaway. He is fifty-seven years old. He lives at 1528 Lincoln Street in Mobile. He is married and has six children. He has lived in Mobile County all of this life. He works for the postal service. Is that a correct statement, Mr. Pettaway?

A That's right.

THE COURT:

Do you live in Mobile County?

A That's right.

MR. MENEFEE:

Q Mr. Pettaway, have you and other residents of Lincoln Street been active in trying to change municipal services to other streets for drainage and such?

A Yes, I have. For more than fifteen years.

Q Have you worked actively with Reverand W. T. Smith?

A That's right.

Q I believe you mentioned to me a problem of drainage in your area?

A Drainage and we also asked for a traffic light. We haven't got a traffic light out there. The drainage is being worked on now.

Q When did they start working on this drainage?

A I would say about three weeks ago or four weeks ago.

Q During these more than fifteen years have you and Reverand Smith and others in the neighborhood that with the City Commissioners and representatives of the City government?

A That's right.

Q Now, what was the outcome of most of those meetin gs?

A Well, most of them was at this time we didn't have money for this venture. And then some time it was promised. Mr. Mims has been out and looked at our street and he promised and that was it.

Q Do you remember when Mr. Mims came out?

A No. It was three or four years ago, I think.

Q Would you describe the drainage problem to us, please?

A Well, whenever we got a heavy rain the sewer and all would back up in our yard. It would wash all of the soil out of our yard and everything. The water in the street would run up in our yard and wash our yard away.

Q That Exhibit before you, number 91, are those part of the petitions and letters that you and Reverand Smith and other residents on behalf of Lincoln Street have presented?

A That's correct.

Q You forwarded those on to the city government?

A That's right.

Q Do you think that the city government has treated Lincoln Street fairly over these fifteen years or more?

A No, I don't.

Q Why do you say that?

A Because when they say that there is no money available and other ventures were being done. Our street was still there.

Q Do you know how big a paving venture this is, how much money is involved?

A No, I don't. But they say it will cost twice as much as it would if they had gone ahead and done it when we first asked for it.

Q How long have you been making this request of the city?

A Over fifteen years.

Q If I suggested a figure of about thirty-five thousand dollars for this venture, would that sound reasonable?

A I couldn't say offhand.

MR. MENEFEE:

Your Honor, we move the admission into evidence of Plaintiff's Exhibit 91, the petitions of Lincoln Street group.

THE COURT:

A No, sir, that's not fair, that's not right.

Q You say it's not a fact that quite recently has your group been willing to stand any assessment for this work?

A I told you what we all realize that we had to pay an assessment. We realize that.

THE COURT:

Were you willing to?

THE WITNESS:

We were willing to.

MR. ARENDALL:

Q Now, was Mr. Langan sympathetic to your- problems out there?

A He came out after one of the rains and saw what kind of condition it was in.

Q But he didn't get the work done for you?

A No, he did not.

Q Are you telling us that Mr. Langan did not get that work done for you even though you were willing to stand the cost of assessment for it?

A No, he did not.

Q Did you tell us that at that time, you were willing to pay the assessments to get the work done that Mr. Langan wouldn't do it?

A No, sir, he did not do it.

THE COURT:

What he really wants to know if you are willing to pay the assessment?

THE WITNESS:

That's right. We were willing to pay the assessment.

MR. ARENDALL:

Q Mr. Pettaway, I hand you an Exhibit which has been marked as Defendant's Exhibit 81. I call your attention to the fact that the top letter on this is dated September 22, 1974, that is the juris to the Honorable Earl Joiner of the Public Works Department., City Hall.

Were you a party to that petition referred to in that letter?

A I am not sure.

Q Can I call your attention to what appears to be your signature on the second page. Is that your signature?

A That's my signature.

Q And that seeks improvement in your streets out there, doesn't it?

A That's right.

Q Now, I call your attention to a letter of November 1, 1974, from Mr. Nickel senior engineer to Mr: Joiner, in which he refers to a cost estimate of lowering the existing street and providing new jointed system, curves and gutter and

pavement estimated to cost forty-two dollars per lineal foot. Were you advised of that?

A Yes, I was.

Q That is a breakdown of how the cost is computed, is it not?

A That's right.

Q Now, I call your attention to a letter addressed to Mr. Joiner by Richard Smith, City Clerk, in which Mr. Joiner is advised that the board of commissioners have asked Mr. Joiner to tell the interested parties that the matter has been considered by the commissioners and that he, Mr. Joiner, is authorized to obtain additional information about the matter. Did Mr. Joiner tell you that?

A No.

Q Nobody from the City Hall ever told you that the commissioners had asked any one to go get additional information?

A No.

Q Then on November 7th, a letter from Mr. Richard Smith to Mr. T. K. Peevey, Public Works director.

MR. BLACKSHER:

November 7th of what year?

MR. ARENDALL:

Nineteen seventy-four.

Advising, Mr. Peevey quotes, "The board of commissioners in conference, November 5, 1974, reviewed the estimate you submitted in the amount of thirty-six thousand five hundred and sixty-six dollars to rework and lower Lincoln Street from Stone Street to Dunbar Street."

"The Commissioner requests that you advise the interested private property owners. The city will not be able to correct the situation at this time inasmuch as the monies are not available in the city budget."

Did Mr. Peevey so advise you?

A No, I didn't get that.

Q Did you understand that the question was money and all you had to do was say that we would stand in assessment and they would do it?

A No, I didn't get that understanding.

Q All right. Here is a letter dated November 13, 1974, from Mr. Joiner, of the Public Works Department addressed to Reverand Smith, he is the one you were working with?

A That's right.

Q Re: Lowering and repaving Lincoln Street.

You observe a reference there to repaving Lincoln Streen?

A Yes.

Q Do you know of any reason why Mr. Joiner would have

talked about repaving if it had never been paved?

A I don't know why he stated it but it has never been paved.

Q And Mr. Joiner then did as he had been instructed to do. Referred the cost of thirty-seven thousand dollars and the unavailability of funds?

A That's right.

Q I want to call your attention to a letter dated October 27, 1975, from Richard Smith to James T. Chaplin, assistant engineer. Saying, "The board of commissioners this day and meeting with the delegation of Lincoln Street instructed you to proceed to initiate a paving improvement venture for Lincoln Street as soon as possible."

Were you informed that that action was taken?

A Yes, I was.

THE COURT:

What was that date?

MR. ARENDALL:

October 27, 1975.

THE COURT:

That was in authorization to proceed with work?

MR. ARENDALL:

Yes.

Q Now, there is a notation up in the top, Judge. Lincoln

Street paving improvement venture number one eighty initiated 1/13/76.

Now, Mr. Pettaway, I ask you again if it isn't a fact that between November of 1974 and October of 1975 and indeed only shortly before October of '75 did you people agree to send assessments for having this work done?

A I don't remember no one kicking on it. I don't remember no one kicking on the assessment.

THE COURT:

Do you remember an affirmative agreement?

THE WITNESS:

No, I don't.

MR. ARENDAIL:

And you do expect to be assessed, now?

A That's right.

Q And you didn't expect to be assessed in the negotiations back at any time before that, did you?

A I did, and I think the group did.

MR. ARENDALL:

I offer this Exhibit.

Q Mr. Pettaway, you have referred to the facts that other areas in the City were paved since you started talking back in 1961 to the city commission?

A That's right.

Q And the time that you actually got it?

Do you know the circumstances under which that other paving was done? Whether it was on an assessment basis or by some dividers who were paying for it themselves or otherwise?

A No, I do not. All I saw was that the paving venture was going on.

MR. ARENDALL:

No further questions.

MR. MENEFEE:

No further questions.

MR. ARENDALL:

Judge, I overlooked the traffic lights.

Do you know what the procedure followed by people where people want traffic lights?

A No, I don t. But I was sent to Mr. Bradford.

Q It is checked into by the traffic engineer at City Hall, isn't it?

A I was sent to Mr. Bradford and Mr. Bradford is an engineer, wasn't he?

Q Right. He makes certain tests such as volume of traffic and number of wrecks and that kind of stuff to determine whether or not a traffic light should be put in .

THE COURT:

Did he advise you of those things?

THE WITNESS:

Yeah, he did.

MR. ARENDALL:

No further questions.

MR. MENEFEE:

No further questions.

THE COURT:

You may step down.

Who will you have next?

MR. MENEFEE:

Mrs. Mable Dotch .

MABLE P. DOTCH

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mrs. Mable P. Dotch . She is sixty years old. She lives at 2529 First Avenue in the Trinity Gardens area of Mobile.

She is a widow and has fourteen children. She attended high school. She has lived in Mobile County all of her life.

your community?

A Well, we have poor drainage. At one time they did put in some drainage.

THE COURT:

What he wants you to do is tell how it affects where you live.

THE WITNESS:

Oh, its bad.

THE COURT:

Tell us what you mean by bad.

THE WITNESS:

When it rains, it gets up and floods the street. You have to wade down the street if you want to cross it. Cars get stuck. First Avenue and Jessie Street flood too, and the water stands there so that if a car on Jessie Street will drown out.

THE COURT:

Mobile has a general flooding problem. How long does the water stand after these tremendous downpours that we have?

A They stand for hours because I have a business on the corner and water comes in there and we have to close.

THE COURT:

Water comes inside the building?

A Yes.

Q What about the homes?

A Some of the people's homes, the water comes in but they don't come inside of mine.

MR. MENEFEE:

Q Is this always a problem in the Trinity Gardens area?

A Yes.

Q How is water carried away? Is there big ditches in Trinity Gardens?

A Yes, we have large ditches. And some of the ditches -- we have some pipe in some of the ditches. Some are still open with no drainage pipes in them.

Q Have you and other people in Trinity Gardens been requesting the City Commission to help you with this drainage problem?

A Yes.

Q How many years are we talking about, Mrs. Dotch? Is it going back to the fifties or the early sixties?

A Yes, its' going back a long time. Ever since we were incorporated in the City.

THE COURT:

How long has that been?

A I can't say.

Q MOre than ten years?

A I can't say exactly when.

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mrs. Janice M. McCamts. She is twenty-two years old. She lives at 959 Ghent Street in Maysville area of Mobile. She is single and she has attended three years of college. She has lived in Mobile all of her life.

Is that correct, Mrs. McCamts?

A Yes, it is.

Q Miss McCamts, have you been active in the neighborhood organizations dealing with, I believe, traffic and some drainage problems?

A Yes, not only that, but it's other things that are happening in the community that shouldn't be.

THE COURT:

What community is that?

A Maysville.

THE COURT:

Ma'am?

A Maysville.

THE COURT:

Now, gentlemen, can you tell me where that part of Mobile, Maysville, is?

MR. BLACKSHER:

That is behind the Ladd Stadium, roughly.

THE COURT:

That would be more or less in the southern part. All right.

MR. MENEFEE:

Q Miss McCamts would you describe the traffic problems that you have been dealing with?

A We have been having trouble with the company that has been of the area for some years. I believe it's over twenty something years. They are a hazard to the neighborhood because we have children all around there. There is a school zone right there in the neighborhood. That extends for a couple of blocks that the schools are in. This truck company is right there at the corner of my street. Therefore they use my street and other streets in the area for traffic going to their business. For loading zone and carrying out and bringing in, you know, that type of business.

Q Have you or other members of the organization attempted to contact the city government to see if they would help you alleviate this problem?

A Yes, we have. We have gotten up petitions asking for help to prevent this hazard to the community. As far as disturbance or parking area and of course speed of the trucks and the loading. The loading is so heavy that we have had this particular thing that happened. A truck that had

this accident on the street that was turning over. The children had just gotten out of school, so therefore any child could have gotten hurt and any matter. Because of this lumber that was falling over on the side in people's yards and everything.

The trucks are falling over -- I mean the lumber falling into the drainage which did happen, too. Because the drainage -- we have a problem as far as streets are overflooding because the drainage isn't properly -- whatever.

But, anyway, we have no sidewalks. When you are going to and from school or your place of business or home or to the store, you don't have anywhere to walk.

As far as the cars coming by when the streets are flooded and spill water all over every one by speeding through the streets, you know.

Q How many schools are there in your neighborhood?

A How many?

Q Are there several, would you name some?

A Yes. There are Williamson High School that is right next to a track which is a big ditch there. The railroad track is right there and it doesn't have sufficient lighting or warning of the train that is coming.

Also cars have fallen in that ditch.

It is so deep that it can hold a whole car.

Around Williamson High School, there is George

Hall Elementary High School. We have another one a couple of blocks or so the other way, west, I believe.

Q The second one you mentioned was George --

A George Hall Elementary.

Q There are quite a few children in the neighborhood in these schools?

A Yes, there are many children in the neighborhood. There are still children in the neighborhood that haven't reached the age of one year of age.

Q And in your attempts to contact the city government have you been able to suggest an alternate route?

A Yes, we have. We suggested a route. We drew to their attention what would be better for them and building. They are expanding so much. The ground that they are holding is pathetic. The houses in that area -- you can't sit on the porch. There wasn't -- there is a hazard of dust all over the furniture. You can't open doors or anything. This kind of thing is hazardous to your health as far as children as well.

Q Is that a result of large trucks stirring up the dust?

A Right. Also, at one part of the intersection in the street they put a sign there for no parking for the cars. Wherefore, their trucks can get through there and go to

their grounds.

Q I see. So, the city put up no parking signs?

A Yes, at a corner so that no cars could park where their trucks -- and those trucks make that big turn there so they can go into their ground.

The schools are right there in that area. There are children right there in that street where they are making that big turn.

They are coming all times of the night, every day, all night long. No matter whether it is the weekend or not. See, these people -- these people don't have to stay in this area.

Q You mean the company?

A Yes.

Q Is this Government Street Lumber Company that you are speaking of?

A Yes, Government Street Lumber Company and that -- there is this oil company next to it. That whole area -- it was -- it was packed off with trucks and trailers and whatever. It's a hazard because you can't see around the corners.

There is dust and there is grass growing up so high. They haven't even taken care of it. As far as -- I don't know about the city -- grounding the area -- what they call

-- but just the same. The company hasn't made any move to clear this stuff themselves. Anything that comes out of there as far as animals and snakes and this kind of thing. This is the weather that they will come out.

Q Has the city government done anything to help the situation?

A No, they haven't. The only thing that they have done -- they ignore what the traffic. Even though -- well, they have one truck that comes through approximately two weeks in a month they clean the sidewalks. Therefore, --

Q The sidewalks?

A Yes, the sidewalk. The streets are torn apart. It has a child going out playing in the streets or going out in the street they could easily get their foot caught in a hole in the street. Whereas these trucks has breaking in the streets and the City might go in and do some kind of work along in the streets and just- patch the streets up. So, the cars would have no way of running so long because you have problems with the cars having to carry them to a business to get them fixed. All of this kind of thing.

With the drainage and this kind of thing.

Q I am a little confused, Miss McCamts. Is there sidewalks in this neighborhood, or not? You said they come along and clean the sidewalks?

MORNING SESSION

July 19, 1976 9:00 o'clock, A.M.

THE COURT:

All right. Whom will the Plaintiff have?

MR. MENEFEE:

Clara Ester.

CLARA ESTER

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mrs. Clara Ester, twenty-eight years old and lives at 705 Fisher Street in Crichton. She is single. She has a B.A. Degree in elementary education and has lived in Mobile County for six and-a-half years. She is presently employed with the Dumas - Westley Center, a neighborhood service organization funded by the United Fund and the Methodist Church that operates in the Crichton neighborhood; is that a correct statement, Mrs. Ester?

A Yes, it is.

Q Mrs. Ester, in our previous conversations you have described some of the drainage problems that are common in the Crichton neighborhood, property erosion and such. Would you tell us the types of problems the neighborhoods in the Crichton neighborhood experience?

A Well, even before I came to Mobile I heard, after arriving in the City of Mobile and working in the Crichton area, that several homes were on the edge of the creek and each rain flow the erosion is like falling into the creek where homes, at this point, are getting closer and closer to the boundary point.

A lot of home owners are fearful and even people that are renting are becoming very fearful that their homes are eventually going to fall into the creek. There have been drowning situations where people in the area have rowed down the creek trying to find kids.

Other problems have been one case we worked on and reported to the Board of Health was menigitis where a family that lives above the creek, all the children were ill and the board of health indicated that it was probably from that creek area that this disease was being carried. Rats are always in the creek and mosquitoes and kids are in and out playing in it and slip and fall into it. About four years ago we talked to Mayor Mims about fencing in the creek or

putting some type of piping in to close the creek up to prevent any more drownings or diseases that the creek is creating in that community. He indicated to about twelve people, I guess, in his office that they could not baby sit by putting fences up. They couldn't send people out to watch the kids and prevent them from getting into the creek. We felt it was a minor thing to fence the area up.

Q Have there been any major improvements in the situation?

A No major improvements. They have been out to -- maybe twice to clean it in six and-a-half years.

Q You also described once to me a request, I believe, for an alternate route or rearranged route with the bus service to assist some elderly citizens in the neighborhood.

What was the problem that they faced?

A Well, the Toulminville bus comes up Mobile Street and, in the past, it used to turn on Nall Street and go to Bay Shore Avenue, coming back north and then circling back around to the Toulminville area. Senior citizens in the area would have to walk from Nall Street up at least four blocks and then up an incline to get to Springhill Avenue to catch any type of bus to take them to town. There are so many old people in the Crichton community that it became a very serious problem for them with heart conditions and other

A It is in the area of Liberty Park which is also in Crichton.

Q Does the Crichton Optimist Club have use of that park or that area?

A To my understanding they do, right.

Q In the recent past, has the Crichton Optimist Boy's Club been segregated?

A Up to about two years ago. We have had kids to go up to join because it was where we considered closer, as far as recreational facilities. They were denied the opportunity to join there, but was told if they went to Davis Avenue, they could become members of the Boy's Club there.

Q Has the Boy's Club operated a lunch program during the summer in the past?

A For at least four summers that I was aware of, yes.

Q You described to me previously the situation of black children not being able to obtain lunches on an equal basis with white children.

Would you tell me about that, please?

A Well, number one, they wouldn't be allowed in the building any way, and the lunches that were left over that

the white kids could not consume during the day, that had to be eaten or was spoiled, they would be set out on the curb. I don't know if they were set out there for the black kids to eat or set out there for garbage, but yet the black kids would easily go to that area and get them a lunch and go home.

Q This Boy's Club on Rice Street is now used as a voting center?

A Right.

Q And it serves the Trinity Gardens area, also, I believe?

A Right.

Q Would you describe some of the difficulties for citizens getting from Trinity Gardens over to the voting place at the Boy's Club on Rice Street?

A They would have to come down St. Stephens Road and possibly pick up the Toulminville, Allison bus and get off at Cotton Street and, at that point, have to walk twelve blocks or so to get there. When I have been at the polls at six- o'clock taking people from Crichton, people to vote, several people from Trinity Gardens have walked up to there at six-fifteen and they would not get the freedom to vote, because of the hour situation.

Q Prior to the Trinity Gardens citizens voting at the

Boy's Club, did they vote in their own neighborhood?

A Yes.

Q At the Trinity Gardens School?

A Right.

Q So, thereafter, would you say that it was very difficult for a citizen of Trinity Gardens, if they don't have private transportation to vote at the Boy's Club?

A I would say that it is very difficult.

Q Are there many sidewalks in the Crichton neighborhood?

A Probably you could count them on one hand. There is not a whole lot of sidewalks in the area, no.

Q Why are sidewalks important in your neighborhood?

A Number one is because kids that are growing up in that community are basically from low income families. They don't have adequate transportation to transport kids to other parks like Municipal or other parks that are, you know, surrounding them. So, the kids play in the street a great deal, which is not to any degree a safe situation.

Even Mobile Street is a very busy street. That is the street the amublance goes down, as far as going to the University Medical Center. So, the kids had to play with no place to ride bikes and they end up in the streets all the time.

I feel that it is a dangerous situation. If the

sidewalks were available, the kids would be in a little safer area. There is no basic recreation for them where they can walk comfortably to a program.

Q In a neighborhood such as Crichton is there also a good bit -- neighborhood interchange and foot traffic by the citizens?

A Yes. People walk all the time. People sit on the porch and communicate with each other. This is their livelihood. This is basically all they can afford to do.

Q Have most or all of these problems been called to the attention of the city government?

A The majority of them, yes.

Q Over a period of time, several years or more?

A I would say for the six and-a-half years I have been here.

Q What sort of response have you got?

A Well, they send someone out to clean the creek during election time. You have a lot of city trucks in the area looking around. The basic problems that have been indicated to the city have not been solved.

Recreation is still not in the Crichton community. The creek problems are basically there. They may have come out and cleaned the creek, yet the same type of situations are going on, manigitis, kids falling into the creek and

houses in danger of their homes being washed away and so the problems are still there.

Q Have you ever met with members of the City Commission?

A I have met with Mr. Mims as well as Mr. Greenough.

Q Did you have a great deal of difficulty speaking with these commissioners?

A The one occasion that I met with Mr. Mims, the difficulty was the fact that we had brought several people from the community to speak with them, and they found it a big problem to seat every body. We felt like if people could come in the room and stand that was important that they hear what he had to say about the issues that they brought to them. He did meet with us, yes.

Q You have certainly been in other parts of the City. Do you think your neighborhood has received equal treatment with white neighborhoods?

A No, I do not.

Q Would you describe the racial make-up of the Crichton neighborhood?

A I would say Crichton, at this point, is probably sixty - forty with the majority being black.

Q And are those concentrated in certain areas or particular areas of the Crichton neighborhood, the blacks?

BILL ROBERTS

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q State your name and address, please.

A Bill Roberts, 148 Tuscaloosa Street, Mobile.

Q How old are you, Mr. Roberts?

A Thirty-five.

Q What is your present employment?

A Vice-president of Cogburn Nursing Home.

Q How long have you resided in Mobile?

A Thirty-five years.

Q That is your whole life?

A That's right.

Q What elective office do you presently hold?

A State Senate district thirty-five.

Q That is the State of Alabama?

A That is correct.

Q Would you briefly describe your history of involvement in politics in Mobile County?

A In 1970 I was elected county wide to the Alabama

House of Representatives and in 1974 I was elected to my present position in the Alabama Senate.

Q You ran in the Democratic primary?

A That is correct.

Q Senator Roberts, you are the sponsor of a bill that is presently pending in the Senate of the legislature of Alabama that concerns city government in Mobile. What is that bill number?

A The bill number is -- you know, I forgot the bill number. We have something like thousands of bills. I really don't know, right off the top of my head, what it is.

The reason that I don't know what it is, there hasn't been a great deal of action on the bill recently. I will have to check. I really don't know what the bill number is.

Q Would you describe, please, what this bill proposes to do with the city government in Mobile?

A Well, essentially, it would provide, based upon a petition and a public referendum, it would provide the City of Mobile with a mayor-council form of government and the council would be made up of nine members. It is based on the -- essentially, the same legislation that provides the City of Birmingham with a mayor-council form of government.

Q This would be a form different from the mayor alderman form presently contained in the general laws of Alabama?

A That is correct.

Q You would have a mayor running at large, correct?

A That is correct.

Q How would the council members, the nine council members, be elected under your bill?

A Seven of the council members would be elected from districts and two of the council members would be elected at large, city wide.

Q Mr. Clerk, would you hand the witness exhibit 62, and Plaintiff's Exhibit 63, please.

May it please the Court, Plaintiff's Exhibit 63 is a summary prepared by Mobile United of a debate that occurred there on May 28, 1976, I believe; isn't that correct, Mr. Roberts?

A That is correct.

Q In which Mr. Roberts participated with Mr. Ed Thornton and Professor William J. Harkins.

Mr. Roberts.....

THE COURT:

What number is that?

MR. BLACKSHER:

Sixty-three. Would you tell the Court two reasons that you have introduced this bill?

A Well, basically, the two reasons -- the major reason is that, in my own opinion, the mayor council form of government is a better form of government. I say that after having served almost two years now as the chairman of the local government committee in the Alabama Senate. So, I have become somewhat familiar with forms of muncipal government and I think that, of course, there are advantages and disadvantages to the various forms.

In my opinion, the strongest form is the mayor-council and I think this is probably indicated by the fact that a majority of the cities in Alabama have this form of government and over the last ten years they have been moving toward this form of government and this situation also exists on a national level.

The second reason is I feel, under the present form of government, the commission form of government, the individuals or all segments of the city do not have an opportunity to be represented. So, I said at the Mobile United meeting and I repeat again that this bill will give wider representation, in my opinion, to the various segments of the city than the present form of government that we have had.

Q How would it accomplish better representation?

A Well, under the present system you have three commissioners that run city wide, that run at large, and under the mayor council you would have a mayor that would run at large and you would have at least seven councilmen that would be running from districts. I think it is quite obvious that you would have more individuals involved in municipal government than you presently have, although they would be involved at a different level than you have now.

It would be an executive - legislative situation, whereas, at the present time, you have, whichever way you want to look at it, either an executive or legislative situation. You do not have the checks and balances provided by a legislative - executive arrangement.

Q Why have you proposed that two of the council members run at large in seven districts?

A Well, basically, two reasons; one, is that I would hope that this was something that I hoped that with certain established members of the community would be -- find more acceptable, and the second reason, would be that having experienced the districts.....

THE COURT:

When you say more acceptable, you mean make it

easier to pass?

A That is correct.

THE COURT:

All right.

A The situation that we have in the legislature, we have had some difficulty in that in running from districts that the legislators have had a tendency, in some instances, to be concerned just with their particular district and the interests of their district and so I felt that by providing two councilmen, at large, that any discussion that took place on the council regarding various municipal issues that these individuals could provide some balance.

An individual, for example, with a district, concerned with a project just in his district or a situation that exists in his district, there would be at least two members on the council to provide the prospective of looking at it from a city wide point of view.

Q Was there any other city's modeled like the mayor council form that suggested this seven - two council to you, or is that your own idea?

A That is my own idea. To my knowledge, I do not know of any cities that have that arrangement.

Q Now, on the question....,

THE COURT:

To that extent, it is different from the Birmingham plan?

A That is correct, your Honor.

MR. BLACKSHER:

Q The question of why the representation was debated on this occasion at the public forum of Mobile United; is that correct?

A That is correct.

Q I believe that the person, Mr. Thornton, who was opposing your bill made the point that the present mayor, city commission form of government, protects majority control; is that correct?

A He made that statement. That is correct.

Q And in fact, I believe Mr. Thornton said that among those who favor minority rule we have only Federal judges and the present delegation from Mobile County; is that correct?

A He made that statement. That is correct.

MR. ARENDALL:

If your Honor please, aren't we getting into the rankest kind of hearsay?

THE COURT:

Well, if this is a debate before the legislature.

MR. ARENDALL:

No, sir. Before the Mobile United, a local group of citizens.

THE COURT:

Well, I think it is totally irrelevant any way.

MR. BLACKSHER:

All right.

Q Mr. Roberts, haven't you....

THE COURT:

It is argumentative. Go ahead.

MR. BLACKSHER:

Q Mr. Roberts, haven't you also said publicly, including this debate, that one of the reasons you introduced this bill was the pendency of this law suit?

A Yes. I do feel that -- I did originally introduce the bill for that reason. I intended for sometime to introduce the bill, because of the two reasons I stated earlier, but it was after that I had decided to introduce the bill that I became aware of the law suit. I did make the statement that I felt that too often in Alabama, on the State level, particularly, for example, the prisons and the mental health situation, that the legislature has not met its responsibility and in those situations the courts have moved into that area because of the lack of responsibility of the legislature.

I have stated on a number of occasions we obviously do have a problem here, in my opinion, and we do not have representation in all areas of the city and, for that reason, I introduce the bill and then I became aware of the law suit.

Q Now, Mr. Roberts, it is a fact, isn't it, that the 1964 or '65 bill or act that set up the optional form of government concerning which there was a referendum in 1973 differs from your present plan in that the former system had a weak mayor council system and also provided for the council to run at large and those are two major differences in your bill; isn't that correct?

A Those are just two, but there is no comparison except in name. There is absolutely no comparison between the bill that the legislature passed in 1965 and was voted on in '73 and the bill that I am proposing. There is absolutely no comparison.

Q Is it a fact that you have proposed that some of the council members run out of single member districts in order to provide minority groups in the city a better opportunity to be represented in the city government?

A That is correct.

Q Is it fair to say that since you have been associated with the Mobile county legislators that they have

understood that in order for blacks actively to be represented and to be able to elect candidates of their choice it would be necessary for there to be single member districts?

A Are you referring to my experience with the legislature?

Q Yes.

A Yes. When I served in the House of Representatives we ran county wide and there were ten members of the House, six of them were attorneys that lived within the immediate vicinity or the same neighborhood. Now, under the district situation, which I didn't particularly care for the plan, but nevertheless, we had districts and we have a wide range. We have an individual who is an owner of a cleaning establishment. We have a man that has been involved in service station work and auto repairs. We have, I think, a black attorney, a young white attorney, and so we have a wide range of individuals that are involved in the legislature now that wouldn't have been involved in years past. So, in that respect, legislative re-apportionment has been good, in my opinion.

Q At the end of the Mobile United debate you said that, in answer to the question were the prospects for the enactment of your bill not too good, from slim to none, but the bill right now is being held up in committee by one

senator and is that still the case, Senator Roberts?

A That is the case, to my knowledge. As you know, we have been in recess for one week and unless.....

Q That one senator is Senator Perloff?

A That is correct.

Q Has he told the delegation why he is holding the bill up?

A No. He has not, not to my knowledge.

Q Do you have any idea?

A Yes. I have some idea, but I cannot prove that.

Q It would be hearsay?

A It would be hearsay; that is correct, but I know why it is being held up.

MR. BLACKSHER:

No further questions.

THE COURT:

You may cross him.

CROSS EXAMINATION

BY MR. ARENDALL:

Q Senator, there has been some testimony here that Mr. Buskey would have beat Senator Perloff for the position in the State Senate three hundred votes that had been cast or three hundred more votes by blacks. In other words, if

governments throughout the state and perhaps the history of Mobile home government under a mayor aldermanic form, did you not?

A Yes. I centered most of my studies on the Birmingham situation and the Montgomery situation, because they were the ones most comparable with Mobile.

Q Is it fair to say that one of the big problems that you found with the mayor council form to have was that of interference by members of the council in the day to day affairs of the municipality?

A That is why I wrote the bill in the way that I did, because -- let's take, for example, the one we are all familiar with, the city of Prichard. It has a weak mayor. There are areas where councilmen can and do interfere and involve themselves in the day to day operations of the city.

Under the bill that I have proposed, even if they go or approach a department head, without first going through the mayor's office, they can be removed from office.

Q What are other differences?

A The other major difference, the council people would be elected from districts and I understand from '63 or '73, those bills, that that was at large.

Q I understood you to say, senator, that you patterned

your bill on the Birmingham bill. Does not Birmingham have a council where all the members are elected at large?

A That is correct. And I have a letter from Mayor Vann recently where he stated that this was going to be a problem for the City of Birmingham. He felt that this was definitely a strengthening of the bill to place them in districts rather than having them running at large.

Q And in either event, there is that major change from your bill and your bill in Birmingham?

A That is correct. But in Birmingham they have nine councilmen from districts.

THE COURT:

They are designated. They have residences, but have to be elected, at large?

MR. ARENDALL:

What was that? I am not clear on that.

A In Montgomery they must run from designated districts and they must live in those districts.

MR. ARENDALL:

In Birmingham they have residential requirements, all elected at large?

A That's right.

Q Two blacks in Birmingham currently serving, are they not?

A Yes.

Q Do you know the racial composition?

A It is five -- four to five whites and four blacks.

Q Has Montgomery found that this kind of districting plan has produced a five four racial block on various issues brought before the council?

A I discussed this with Mayor Robinson, who is a close friend of mine. He has the opportunity or privilege to attend the council meetings, but he cannot interfere in any way unless he called on. He has told me, with the exception of a few issues, one of which was to rename a street Martin Luther King Memorial Drive, that there has been very few problems.

Q You have recognized, senator, that there is a risk of fragmentation of a community through single member districting, do you not?

A I think that is debatable. You can make an argument for that. You can also make an argument for running at large. For me, it is very difficult to say.

Q Is it fair to say that recognizing that reasonable men may reasonably differ about whether the City Commission form is a better form than the form we would have .....

A I acknowledged that before Mobile United and other groups that that is debateable.

member of the County Commission and Ron Webster, a local business man, were they not?

A That is correct.

Q Who were the leaders in the first election?

A Gosh, it has been seven years, almost.

Q Wasn't it Mr. Webster?

A Mr. Webster, as I recall, Mr. Webster led the ticket and, in the runoff, I think I won by twelve hundred votes.

Q Did you seek black votes?

A Yes.

Q Had you, on previous occasions, been to the non-partisan voters league and sought votes for others you supported?

A Yes.

Q Since your election, have you been available to blacks and whites who have sought to speak to you about matters of concern to them?

A Yes. I have tried at all times to make myself available to anybody, black or white.

Q Have you ,in fact, have any contacts with blacks including black leaders?

A Yes, many times.

Q Could you name any particular black leader which whom you have had numerous contacts?

about how to handle things like this and I urged him to please come to me first and at least let us discuss the situation before it more or less went public.

Q Did he agree to that?

A Yes. I felt good about the meeting. I thought it was worth while and when I left I felt we had really had a meeting of the minds. However, after a period of quiet it continued as it was before.

Q You mentioned Mr. LeFlore sending copies or addressing copies to many persons, including the FBI. Has the FBI investigated that type of complaint?

A Yes. Any time a letter or request of this type gets to the FBI, the Department of Justice. it has been investigated and the FBI always conducts a full investigation of whatever the incident that they are asked to investigate is.

Q Has the FBI ever reported to you that they found substance in any of these complaints?

A There has never been a report to me by the FBI that they found evidence of police brutality in the Mobile Police Department.

Q There has been a lot of talk in this case, Mr. Doyle, and I am sure you have heard the testimony about this Diamond -- the so called alleged lynching incident.

Will you tell us when you learned about it and what happened? Give us a chronology of this.

A All right. I believe my dates are accurate, at least the time lapse, I know, is accurate. It was reported to me on Wednesday afternoon by Mr. Clint Brown, who was the attorney -- I don't know who he was representing at the time, but he called me as an attorney to report this to me.

Q Is Mr. Brown a partner in Mr. Blacksher's law firm?

THE COURT:

I will take judicial knowledge of that.

A He called me and related.....

THE COURT:

I don't know whether he is a partner or not. He is in the firm.

MR. BLACKSHER:

Let the record show he is a partner.

THE COURT:

Okay.

A He related an incident to me concerning a hanging or lynching or he described it in several different ways. It was certainly unusual and it shocked me to even hear it.

As a matter of fact, it was hard, at that time, for

me to believe that something like that could happen. Well, at that time, I said this is, of course, -- we agreed it was a matter of urgency and needed immediate attention. So, we set a meeting as early as possible the next day. This was in the afternoon of Wednesday.

So, we had a meeting on Thursday. In the meantime, Dr. Gailliard who is, as you know, connected with the N.A.A.C.P. called and expressed his concern. He had heard it and told me, at that time, that he would not be at the meeting, but nevertheless wanted to express his concern. So, we had the meeting.

Q Who was present at the meeting?

A Well, there was a number of people present, members of the non-partisan voters league was present. The District Attorney's office, the FBI, they had been notified, but, as I recall, were not present at this meeting and the chief of police and myself. I might point out that I was the only Commissioner present at this meeting. The reason for that was, and I realized at the beginning that the information that we had received was sketchy, at best, and had no specifics.

It was a police matter and was my responsibility and I thought, therefore, that I should hear the complaint in its entirety and make a determination as to how to handle it and then report it to the other Commissioners.

Q All right. What happened at the meeting?

A We went through the details of the incident in which they described to me that a young black male was arrested and that a mock lynching or hanging took place in the downtown area, generally in the vicinity of Wintzells on Conti Street.

They said that the man had been lynched and I made the remark then, "If he had been lynched, most certainly he would be dead.", and that they then -- we referred to that, after that, as an alleged happening.

Needless to say, every one present was shocked, the chief of police and myself, the District Attorney's office, the City Attorney, who was also present, and considered this a matter of utmost urgency and we immediately instructed our police people to start an investigation. This was on Thursday.

Now, on Friday, about Friday afternoon, the City Attorney, Mr. Fred Collins, called and informed me that the first information that he had gotten, the first statements that he had read that were taken from some of the officers who were named, indicated that, in fact, this had happened and that we were to get into it further.

When we have an internal investigation in the police department, we take statements from every one involved,

plus their supervisors and on down the line, and it was naturally -- it was going to be a little time consuming to get all of this information together. So, we did and we met again on Monday -- as a matter of fact, we met by way of many phone conversations all during the weekend, but on Monday we met again and, with the exception of one statement from one party we had assembled all of the information.

On Tuesday, which is our day to meet, the day that we have our conference meeting, City Commission meeting, it was then, that afternoon, and we got the last bit of information we needed to bring all of the story as we knew it in focus.

At that time, I called the other two Commissioners and, with the chief of police and the City Attorney and others, we met in my office and I detailed the incident, to the best of my knowledge, to them.

They were very shocked and upset and, to my knowledge, neither one of them had heard of the incident. I believe Mr. Greenough had said he had heard some conversation or rumours, but he had probably discounted it, but, at any rate, this was the first knowledge they had. We met then for quite a long time to determine what should be done.

At that point, we took what I considered to be immediate positive and stern action.

This was an administrative action of the police department. One man admitted that he was the person involved, who was most responsible. He was immediately terminated. Seven others were suspended for fifteen days and then the matter went into the hands of the grand jury who conducted an investigation.

The grand jury then indicted five men, including the one we had terminated and exonerated three.

Q Exonerated three of the people that you had suspended?

A Three of the people we had suspended were exonerated. I might add the suspensions -- we based the suspensions on the fact that these men had failed to report it and this is an administrative action. They were suspended for failing to report an incident of this type.

The five men were indicted by the grand jury and they are awaiting trial, at this time. The other three served out their suspensions and were put back on duty and that is -- let's see, I don't know exactly the status of those three other men, at this point, but they are back on duty at the Mobile Police Department.

But what all of this led to was what we got into after this and that was a very, very intensive investigation into not only this incident but into a number of others that

had been reported in the last, I would say, within the thirty days prior to this and our investigation was conducted personally by the chief of police in co-operation with the City Attorney and several other police officers.

It, as you know, resulted in the termination of two additional officers, plus six suspensions of varying degrees handed down to other officers. Those did not connect or those were not related to the Diamond incident.

Q Now, just to try to complete the picture, did one or more of the persons suspended, as a result of this subsequent investigation, take their cases to the County personnel board?

A Yes, a number of them have appealled.

Q Has there been any action as to any of those appeals?

A I believe one of them had a suspension reduced.

Q Didn't the papers indicate, I thought two.....

A Possibly two. I haven't kept track as closely as perhaps I should.

Q There has been some suggestion here, Mr. Doyle, that the only people in Mobile that had any concern about this Diamond occurrence were members of the black community; is that right?

A Absolutely not. There was concern expressed throughout the community from all sides. There was concern voiced

by such organizations as the League of Women Voters, to mention some -- they are not necessarily white, but they are a mixed group, the Optimist's Clubs, Mobile United, a number of organizations.

Q The Chamber of Commerce?

A The Chamber of Commerce. They made a report or had a report on it. The N.A.A.C.P. ministerial groups, both black and white, expressed concern.

I had letters of concern expressed by individuals, some black and some white, and it was a general feeling of upsetment and concern throughout the community and it was not necessarily related only to blacks.

Q Did you have any correspondence with Mr. Gary Cooper about this matter?

A Yes. I corresponded, from time to time, with Representative Cooper on a number of matters. He has easy -- we get along together and we talked about problems about his community and Mobile as a whole and he had .....

THE COURT:

Is he a black legislator?

A Yes, sir. He had expressed, in a letter expressing concern that he wrote me and outlined a few things that he thought would be of benefit to the police department and to the city as a whole. It was along the same lines of various

requests that I got from other groups.

After having received many of these inquiries, requests, you know, statements of concern and that type of thing, with some help from the -- well, from everybody involved, the chief of police, the City Attorney and the other two Commissioners, I developed a response to this which was a response designed to answer some questions and designed to assure the people that the matter was to be dealt with and that it was not going to be as some people put it, white washed. It was not going to be put under the table and that it was going to be dealt with and the City of Mobile and the Mobile Police Department was going to do everything they could to assure them that something like this would not occur again.

MR. ARENDALL:

If your Honor please, for the first time this morning I saw this statement that Mr. Doyle prepared in connection with this recent incident. It has not been exhibited to counsel for the other side.

When was this prepared?

A I had a lot of papers I was going through and I came across it.

Q It has not been exchanged. I would like to offer it as a statement.

I take it you prepared this to give out to people?

A Yes, sir. This statement was prepared to give to people who, for instance, the N.A.A.C.P. met, the ministarial groups met, Gary Cooper, Representative Cooper, received a copy of this and I had a number of copies made and it was given to the media and it was just given out generally around to the people who had an interest.

MR. ARENDALL:

I will offer it as Exhibit 85.

(Defendant's Exhibit 85 received and marked, in evidence.)

MR. ARENDALL:

Q Mr. Doyle, when you sent the information that you supplied to Mr. Cooper, did he indicate any desire to further pursue the matter?

A He indicated in the letter to me -- his letter said, in essence, that it appeared that we had the mechanism underway or proposed to address ourselves to this problem.

He called then attention to the need for increased training for police personnel in the area of human relations, but generally seemed satisfied with this statement that was given to him.

Q When all of that was developing, did you and any other member of the Commission attend any meetings other than

the ones you have mentioned?

A Yes, sir. I might add that I had numerous meetings in my office with various groups, even -- well, at any rate, there was a meeting called by the Mobile Ministerial Alliance, I believe is the name of the group, which is made up of black ministers. They had a meeting at Mount Olive Baptist Church. I can't remember exactly the day, but it was right during the first week of the -- when the incident became public.

They asked me to attend and asked Mr. Mims to attend -- asked all of us to attend. Mr. Mims and I went to Mount Olive Church one morning. I had a statement which I read and which explained to these people assembled what our position was, at the time. It was more like sort of a status report. We had just gotten this information in our hands, really, and it was sort of a status report and we went and the media were there. It was covered pretty well.

Then subsequent -- no, this must have been on a Monday because subsequent to that there was a meeting held by the N.A.A.C.P. that night.

Q Mr. Doyle, as you reflect back on that occurrence, do you consider that the city and your department and the police department reacted vigorously and effectively in connection with trying to do something about it?

A I think we did. I feel that we did everything that we could possibly do. We did it with no prodding from any particular group. We did it because we were vitally concerned. We, ourselves, were really concerned about the incident. We acted quickly, almost immediately, I would say, considering the fact that I would say we had to gather information.

We acted on Tuesday afternoon. We decided what to do. It was made public that same afternoon and the man who was terminated was terminated that day. The men who were suspended, their suspensions began that day. We acted, I think, decisively. I feel that what we did was proper and I believe that the men involved who now are awaiting trial in the Court should be given due process as everyone else and that anything further we have to say or do concerning those men would probably tend to jeopardize the litigation.

Q Now, do I understand you to say that you have formed an internal investigation unit and it is to ride herd on reports of such incidents?

A Yes. Let me say that -- oh, since Captain Wimberly left the Mobile Police Department and went with the Sheriff's Department and since- Captain Walter Levine died, we have suffered from a shortage of men in that Captain's rank. It has been our intention to establish such a unit as long as ten months ago when we requested that the

personnel board fill these existing vacancies, at least to give us a certification from which to choose people for these vacancies.

At any rate, we recognized the need to have an orderly way in which complaints of this nature were handled and that the people who made the complaints would be properly responded to and they would provide to all due haste in resolving it. We determined shortly after -- well, all of this came to a head that rather than wait on the personnel board we would go ahead and form this unit.

Q Let me interrupt you a minute. You can't just go hire somebody because you have a need for them, you have to get certification from the Mobile County personnel board?

A That is correct. In other words, if we want personnel, we have to go to them and, obviously in a position like this, as extensive as it is, you can't just pick somebody and make them an investigative officer. They have to have the background and the knowledge.

The opportunity presented itself when we discovered a former Mobile police officer retired and serving as the head of Faulkner State law enforcement school was interested in coming back to the Mobile Police Department. We talked to him and he agreed that he would and he would be the man in charge of the investigative unit. That is Major Bill

Lamy, who served some thirty odd years with the Mobile Police Department. As a matter of fact, he had the job of investigating internal matters and also citizens' complaints before he left the City of Mobile Police Department.

Major Lamy came and, as a matter of fact, he came on board after having notified his people of his intentions, he came on board on the first of July. We have not yet finished forming the unit.

We believe, at this time, that we will probably have Major Lamy and two other police officers, sworn officers, plus some secretarial help, and already he is presently involved in conducting investigations whenever they come up.

Q Do you, on occasion, Mr. Doyle, get complaints from whites as well as from blacks about alleged abuse of power by individual policemen?

A Yes. We get complaints from all citizens. The police department, as you can imagine, we have a number of complaints.

Q There has been some testimony here about the cross burnings. I believe someone has commented that you did not make any statement about that.

What was your attitude about that matter?

A Well, let me say that I deplore cross burnings. I deplore murder, rape, robbery. I deplore all of these things

them establish it, give them rules to go by, and give them some training and tell them what we thought would best help.

Q What is the community relations division?

A That is a division of the Mobile Police Department which -- well, community relations, we call it public relations, it does things such as visit schools and that type of thing, show movies and we show movies to ladies to tell them how to protect themselves and we show movies to kids to tell them about the evils of drugs and residents about how to take care of their houses and we also have a regular program of visiting high schools and interest young people in becoming -- not necessarily police officers, but at least getting into the criminal justice system. We do that on a regular basis at all of the high schools.

Q All of this done among blacks and whites and no distinction based on race?

A That's right. It makes no difference.

Q Mr. Doyle, the police department or certain of its activities insofar as employment and promotion practices are subject to the supervision of this Federal Court in the Allen case, are they not?

A That's right.

Q And you have an affirmative action planned in connection with that matter?

A That is correct.

Q And in your opinion, how is that working?

A We were directed by the court to develop a plan by which we could recruit minority people into the police department. As you know, and I will have to relate this to the activities of the Mobile County Personnel Board, because they are really the ones who are responsible with furnishing us with personnel.

We were directed, along with the personnel board, to develop a plan by which we could attract minorities into the Mobile Police Department. We certainly needed that and we needed the minority groups in the police department.

So, we developed a plan that was subsequently presented to the court and it was examined and found to be acceptable and we were told to continue or go forward with this plan, to implement this plan. I really would like to say, though, that we have not recruited blacks like we would like to recruit them to the Mobile Police Department. We haven't had as many applicants as we should and we certainly would like to have more.

Q Do you have any plans to try to improve that?

A During the incident, during the time of the incident, I was given some references of people to contact. One, in particular, I indirectly contacted to see if he would be

amenable to giving us some help and he has had a very good track record in recruiting blacks and it is my intention, at the proper time, to contact him to see if he can help us, not necessarily to change what we are doing, but to do it better or to add some inovated ideas.

Q Is the fire department integrated?

A Yes.

Q How long has that been?

A I really don't remember. It has been probably -- I think Mobile was the first fire department to have blacks on it in the State of Alabama.

Q No Court suit ever brought on that?

A No, never any court action.

Q As a matter of fact, has the Mobile Beacon published a letter of commendation in connection with the fire department?

A Well, that was in regard -- we were integrated, the Mobile fire department had blacks, but they were -- and this was back some six or seven years ago, they were in what we call black companies. There was one company all black and there were no blacks in the white companies or vice versa.

At some point in time it was my decision, along with that of the fire chief who, at the time, was Chief Douglas Melton, retired now, to as we put it, to break up the black

departments, black companies, at least, and we did that and we put the black firemen out, all around in the different companies at different places, and the Mobile Beacon wrote a nice article in the paper about how much they appreciated it.

Q The black community hadn't filed a law suit or anything of that nature?

A No, no there wasn't a law suit.

Q There had been some testimony here about the location of fire hydrants. I believe particularly about Mr. Randolph in the Plateau community.

Just briefly can you tell us whether there is any discrimination by City Hall as to where fire hydrants are located, where there are more in black communities than white or anything of that sort?

A No, sir. That is determined by the underwriters. What we do, the city of Mobile's water and sewer department, installs the fire hydrants and the City of Mobile pays for it. We go according to -- if the insurance people say one is needed here we put one there. In a new subdivision they will lay out exactly where fire hydrants will go.

Q Some indication by Mr. Randolph of lack of response at City Hall to any matter that he brought to their attention.

is located.

Q In your opinion, is the question of where a traffic light should be and should not be determined by racial factors?

A It is absolutely not.

Q Briefly, outline to us, Commissioner Doyle -- and if the Court please, I expect to go into this further with Captain Winstanly who is directly in charge of it, but I would like just a brief outline as to how the police department determines the number of policemen to be patrolling various areas and so on.

There has been some complaint by, I believe, a number of these witnesses that they don't get enough police protection in that particular area.

A Yes, sir. Well, the city is divided, at present, the city is divided into three major areas. This is as it relates to the police department.

One area is covered by what is known as the ten squad, one by the twenty squad and one by the thirty squad. The areas are divided into beats. It was about ten years ago that we had twelve beats. The city was divided into twelve -- the three areas were divided into twelve beats -- not twelve beats each, twelve beats overall. Through the years we have changed that.

We have changed from twelve to eighteen in order to give better concentration of coverage and then we went from eighteen to twenty-four and, at present, there are twenty-eight areas.

When you say how do we determine and area, it is determined by -- naturally geography has something to do with it or maybe an interstate highway or something of that type might determine one boundary but we tried to divide it where the maximum per capita coverage will be available to all of the citizens.

Every beat, as we call it, all of the twenty-eight beats, has a car, blue and white, assigned to it.

We now have weekly crime stats which are given to us as to burglaries and robberies telling us what beats are most heavily hit, whether it is the afternoon, whether it is the morning, whether it is nighttime and based on these statistics we shift people, always leaving one blue and white in each area, but we shift personnel to more or less beef up an area if there has been a particular outbreak of say house burglaries or automobile burglaries or what have you.

Q I take it then that you try to determine, as best you can, what particular areas need additional protection at any given time?

A That's right, and that is based on crime statistics.

Q I will ask you whether, in your opinion, the efforts of the police department to provide police protection for the various areas of the city are determined in any respect by racial considerations?

A No.

Q Mr. Doyle, do youconsider that since your election as City Commissioner and your re-election as such, that you have fairly represented all citizens of this area?

A I do.

Q Has that been your purpose and intent?

A Yes.

MR. ARENDALL:

No further questions.

CROSS EXAMINATION

BY MR. BLACKSHER:

Q Mr. Doyle, you feel like you have always fairly represented the particular rised interest of the black community?

A I do.

Q What are some of those particular rised interests?

A Beg your pardon?

Q What are some of the particular rised interests of the black community that you have fairly represented?

I will let you make your record. Go ahead.

MR. BLACKSHER:

Mr. LeFlore made these recommendations about a citizen's review board as a way to deal with police brutality complaints?

A I think so.

Q You disagreed with that?

A Yes. I think I disagreed with the review board because it is demoralizing to any police force.

Q Was there any other groups besides Mr. LeFlore and the NAACP who also asked for a review board?

A I presume they did. They haven't recently asked for one. They haven't asked for a review board as related to the Diamond incident.

Q What other groups have asked for a review board?

A Well, they don't necessarily call them review boards. They call them by a number of names, citizen's committees, concerned citizen's groups or what have you. But they all probably have the connotation of being a review board.

There was a request by -- let's see, I think representative Cooper requested to have a committee, although he said not a review board, but a committee. One of the ministerial groups wanted a committee which, in my judgement, could have become a police review board.

am sure the press wouldn't misquote me.

MR. BLACKSHER:

We offer this in evidence.

(Plaintiff's Exhibit 102 received and marked, in evidence.)

MR. BLACKSHER:

We have marked in pencil that statement and I want you to see if it refreshes your memory and whether you think that is accurate.

A I am sure that is accurate. He was, at that time, in regard to the City's attempt to get some law enforcement funds, some funds from the Federal government to promote good law enforcement, and Mr. LeFlore was apparently calling on the law enforcement assistance administration to withhold the funds until we did whatever it was he was seeking for us to have done and that is when I said I was sick and tired.

Q Let's talk a minute about the Diamond incident, Mr. Doyle. You said that the meeting attended by Mr. Diamond by the non-partisan voters league, the D.A. was there, the chief of police and you were the only commissioner.

Are you sure that Mr. Mims was not also there?

A I don't believe he was there. I believe I was the only commissioner there. It was a room full of people, you understand, and there were a number of members of the non-

partisan voters league there, I know, and a number of attorneys there, too.

Q You recall me being there, for instance?

A I don't recall your baing there or not.

Q Mr. Brown was there?

A Yes.

Q Reverand Hope from the non-partisan voters league?

A Yes. I believe so.

Q Do you recall what Mr. Brown and that delegation asked you to do on that Thursday that the meeting was held the day after Mr. Brown had telephoned you on the phone and reported this incident?

A Well, specifically, I don't know that I recall any demand that they made or any requests that they made. The meeting, as I recall, was -- of course, it was an emotionally charged meeting, as you can imagine, and we, as a city commission and me and the police and other people, the District Attorney and others involved with the police department, were very upset about it. It was obviously, to us, the thing to do was , number one, to determine what happened and that is what we endeavored to do.

Now, it would not be proper for me, as police commissioner, to take any precipitous action based on what I had heard at that meeting. You understand this was the

first time that I had heard it except the conversation on the phone with Mr. Brown. So, it wouldn't have been proper for me to take any precipitous action, at that time, until I endeavored to find out what the facts in the case were, and that is what we did.

Q In fact, the precipitous action that that group asked you to take was to suspend officer Patrick with or without pay. In any event, to get him out of the line of duty, because they thought he was dangerous; is that right?

A That's right.

THE COURT:

Officer who? Is he the one that claimed to have made some later statement about he put the rope around the man's neck?

A Patrick was the officer who had admitted that he had done what was alleged to have been done.

THE COURT:

All right.

A Here again, we didn't know anything for a fact. This was what people were saying, their telling us. It was shocking to us to hear it.

MR. BLACKSHER:

You didn't have Officer Patrick under investigation, at that time?

A Not in regard to this instant, no.

Q Didn't you have him under investigation for some other incident?

A I don't know. I am not familiar with that. Officer Patrick, they say, you suspend Officer Patrick immediately. Well, as a matter of fact, we did take Officer Patrick out of the area in which he was in, out of the division he was in, to get him away from what might have been a situation to jeopardize him or someone else, but it certainly wouldn't have been proper for me to say, "Well, I believe what everybody is telling me. Therefore, I am going to suspend Officer Patrick immediately." That wouldn't have been fair to him or anyone. The results were that he was, in fact, terminated.

THE COURT:

When?

A On the following Tuesday afternoon.

MR. BLACKSHER:

Would the clerk show the witness Plaintiff's Exhibit 65?

I am showing you, in a group of newspaper clippings, Mr. Doyle, marked as Plaintiff's Exhibit 65, the front page of the Mobile Register, Sunday morning, March 28, 1976. The headline is "CB Theft Suspect Shot By Patrolman"?

A Right.

Q Would you look that article over, especially the parts that are underlined, and see if it refreshes your memory about Officer Patrick?

A Yes. He is the one that shot the CB thief..

Q This is the man who had two bullet wounds in each of his thighs, a single wound in his right ankle and superficial bullet wounds in each of his wrists?

A That is what is reported here in this paper.

Q And that was approximately -- well, just a matter of two or three days before this alleged lynching incident occurred, right?

A Let's see, this was Sunday morning. I guess that was the Saturday night. It apparently was about a week ahead or a week before.

Q A week before?

A Something like that. It was pretty close, right.

Q And officer Patrick was not under investigation for that shooting?

A Any time a police officer discharges his weapon he is under an automatic investigation.

Q Isn't it a fact that the delegation that attended the meeting on Thursday pointed out this incident as being related and another reason for suspending Officer Patrick immediately,

even if suspending him with pay was necessary?

A I don't recall that, but I am sure they brought that up.

Q You said that on Friday, the day after the meeting that we were talking about.....

THE COURT:

Let me get some times straight. With reference to when attorney Brown called you on Thursday, when is the alleged mock lynching to have said to have occurred?

A As I recall it was to have occurred ten days prior to that, I believe. I am not positive of that time.

THE COURT:

Isn't there something that we can agree on? Aren't there enough facts that we can establish that time by agreement?

MR. BLACKSHER:

Yes, sir.

MR. ARENDALL:

If you have a copy of the indictment, wouldn't it state what date it was?

MR. BLACKSHER:

The grand jury report, which is the front part of the Exhibit 65, says that the event erupted on the night of Mareh 28, 1976, which would be the same Saturday night.

THE COURT:

With reference to the shooting incident. All right. Well, now, let's get dates we are talking about here. What was the date of the Thursday that attorney Brown called or mentioned it?

MR. BLACKSHER:

I believe it was Wednesday, your Honor.

A That's right. Wednesday afternoon, because we met on Thursday.

THE COURT:

All right. What was that day?

MR. BLACKSHER:

The 31st of March, is that a real date?

THE COURT:

All right. That would have been three days after the alleged incident. What is the date of the story there in the newspaper?

MR. BLACKSHER:

March 28th, is the date of the paper, which means that the event occurred on March 27th.

THE COURT:

All right. Go ahead.

MR. ARENDALL:

Judge, I must say I don't think you are wrong, but

I am looking at somethin g here that is headed news release dated April 15, '76 and it says here that Mayor Doyle received a formal detailed complaint from Mr. Diamond's attorney on Friday morning April 9th. I don't know whether that is another .....

A That probably is right, except that it wasn't Friday morning. Well, we might have received something in detail from him, then, but the meeting we had was on Thursday.

MR. BLACKSHER:

It says this, if I may read and just for the purpose of trying to get this straight.

"Police department and City attorney immediately started an investigation at 5:00 P.M. That same day the District Attorney's office and the FBI were informed and requested to conduct an investigation. On the following Tuesday, April 13, 1976, nine matters were called to the attention of the board of commissioners of the City of Mobile", and, at that time, we thought we had sufficient facts and so forth and the talk goes on. This is part of our Exhibit 75. Whether it is accurate, I don't say, but it is dated April 15th and it would hardly appear to me that there would be a news release on A pril 15th that we would be very off on these dates.

It would appear to me that the Tuesday on which Patrick was fired must have been April 13th and then.....

THE COURT:

Well, certainly we would have some record of when he was terminated, don't we? Can we establish that date and get at it backwards from that date?

A The complaint was made by phone Wednesday and the details of it was Thursday and .....

THE COURT:

All right. Let's go back at it from that date. Do some of your records indicate when he was terminated?

MR. ARENDALL:

I am looking, Judge, to see. There ought to be some newspaper articles somewhere around here that would show.

THE COURT:

Why don't you examine the City records at Noon time and report back to us. Let's go on to something else.

MR. BLACKSHER:

Mr. Doyle, you testified, didn't you, that following the revelation of the Diamond incident, you initiated or ordered a very intensive investigation of this and other matters that were before you, at that time, other complaints?

A Right.

Q Now, when you say a very intensive investigation, how

much more intensive was it than investigations you have previously conducted in response to these complaints?

A Well, for one thing, it involved the administration of polygraph examinations which the others hadn't. It also involved more interrogation of people in the community and I guess you would say when we asked an officer for a statement and he writes a statement, that is one thing, but when we actually question him at length then we went into it a little deeper trying to get at the root of all of the problems, trying to get at the root of all of the problems as regards to the number of complaints that we had.

Q You mentioned earlier that you had three major areas for patrols, the tenth squad, twenty squad, thirty squad -- what is the six hundred squad that Mr. Patrick was in?

A The six hundred squad, you know, I mentioned to that whenever we found or whenever the statistics indicated that we had a particular problem in a particular area we more or less beefed that area up. The six hundred squad was formed in order to address itself to the increasing problem of burglaries, primarily auto burglaries, which involved primarily CB radios. The squad was formed and they were not put on -- I can't get too technical about how they were deployed, but they were not assigned during a regular tour of duty.

We would take from statistics a framework of time. If we determined that the critical hours, as far as automobile burglaries were concerned, were from ten o'clock in the morning until approximately four o'clock in the afternoon, then that is the time that the squad would be on duty. It was formed particularly to address itself to the burglary problem in Mobile. It was in addition to the others.

Q When was it formed, Mr. Doyle?

A I don't know exactly. It has been back some time ago.

Q Nineteen sixty-nine?

A No, no. More recently than that. Like I said, I don't know exactly when it was formed, but I would say probably within six months, maybe, something like that, prior to this.

Q What geographical area of the city did it work in?

A It moved around, depending on these statistical data that we got every week. If the statistics show that the area needed attention and was, say, the Loop area, that is where they would be. If it shifted to Toulminville that is where it would be, or downtown, or whatever.

The deployment was dictated as to what statistics showed the need was.

Q Did the six hundred squad have any special orders concerning what kind of tactics or measures they could take?

A No. The six hundred squad was given the mission of reducing burglaries.

Q They weren't given any particular license, for example, with the use of weapons?

A Absolutely not.

Q Do you know whether, after you investigation, whether, in fact, some of the police supervisors had given this license to these officers?

A Our investigation revealed many times about instructions that had been given these men. I don't know that it would be proper for me to go into detail about that since all of these men have appealled this to the personnel board under the grievance procedure and two of them have appealled their terminations, and at the risk of jeopardizing either pro or con, I don't think it would be proper for me to comment on that.

Q Well, your testimony is that you feel like you have acted immediately and decisively in this matter?

A Absolutely as quickly as we possibly could.

Q You did say the City Attorney, Mr. Collins, confirmed, based on his interview of police officers, this alleged lynching had, in fact, taken place some four or five days before you acted to suspend Mr. Patrick?

A Mr. Collins came to me and we were all involved in

this, by this time, as you can imagine. Mr. Collins came and said to me on Friday that the information that he had, at that time, which now the information I am talking about would be statements taken from various officers, but he said the information that he had gotten so far indicated to him that it had, in fact, occurred and then our reaction to that was that well we have to get all of the information, which meant we had to take statements from every officer involved and their supervisors, too.

Q Wasn't it true that the various delegations from the black community -- that the point they were making was why can't you suspend people without even penalties attached to it first and then conduct the investigation later?

A I think that we acted properly in the way we handled it.

Q You also said, although you deplored cross burnings, you did not feel any obligation to make a public statement about them any more than you feel about burglaries or rape?

A That is correct.

Q Were you aware or weren't you aware that these cross burnings were creating particular anxiety in a large community here in Mobile?

A I might add that the majority of the cross burnings were in Mississippi or Baldwin County, but certainly an

outbreak of violence of any kind creates concern.

This kidnapping of the 26 children and burying them under ground creates concern. I was equally concerned about the cross burnings as I was about everything else.

Q For the record, now, the twenty-six children kidnapped were in California, right?

A Well, sure.

Q Would the clerk show the witness Plaintiff's Exhibit 62?

Now, this is a newspaper article from the Mobile Press Register dated Friday morning, June 25, 1976. It says that, and I am reading from the third paragraph, Mr. Doyle, "State Troopers reported at least twenty-five crosses set afire in the two southern most Alabama counties", meaning Baldwin and Mobile, correct?

A I presume that is correct. Southern most, yes.

Q "Meanwhile at least seven crosses were reported in Escambia County, Florida in front of black churches", and then the top of the next column, "Mobile Police said one cross was burned off of Avenue A on Cottage Hill Road in front of a black man's house"; were you aware of that?

A I was given a report on where they were burned. I don't recall whether it was in front of a black man's house or not.

Q Mr. O'Connor, would you show the witness Plaintiff's Exhibit 101?

Do you ever read the Mobile Beacon, Mr. Doyle?

A Not very often.

Q Well, what we have here is Plaintiff's Exhibit 101, a xerox copy of the front, and it looks like the second page of the Mobile Beacon, dated July 3, 1976. The headline is, "Cross Burnings Threatening Letters Raise Concern in Black Community", and on page two of this article, in the third column, it says, "Mobile Police Report Three Burnings and State Troopers Estimated As Many As Twenty-Five Crosses Were Burned in Mobile and Baldwin Counties".

So, even if all -- well, the balance or twenty-two of the crosses were burned in Baldwin County, at least three were burned in Mobile and perhaps more, but you said you weren't aware or were you aware that these cross burnings were creating some anxieties in the black community?

A I am aware that they created anxiety as other matters create anxiety.

Q Well, isn't it a fact, Mr. Doyle, that because of the particular constituency that elected you and keeps you in office that that would have been difficult for you to politically come out strongly about statements about cross

burnings in Mobile?

A I don't think it would make a bit of difference. My constituency, they abhor cross burnings as much as I do. I don't think that if I said I abhorred it publicly on the front page, it wouldn't make any difference. They abhor it, too.

Q You didn't think it was important enough to do that?

A That is correct.

Q You did meet, however, in the wake of the Diamond incident with a Klu Klux Klan, correct?

A They requested a meeting in my office, which was held.

Q And that was reported in the paper?

A I didn't report it. It was reported because the media were there.

Q Concerning the Mobile fire department, Mr. Doyle, what percentage of the employees of the Mobile fire department are black?

A The fire department has twenty-seven black people and four hundred and nine white.

Q Have you done any recruiting for black firemen like you have for black police officers?

A We don't have a specific program as we do for the

number two and it will establish a rating for the fire department itself.

Q Do you know when the last final report was written, Mr. Doyle?

A I am not sure. I think it was 1964. I am not sure.

Q I was going to ask you again, is it your testimony that you don't see that the black citizens or the black community in Mobile have any particular rised interests different from those of other groups?

A If you would, Mr. Blacksher, tell me just exactly what you mean by particular rised interests.

Q Well, let me ask you the question this way, are you in favor of the City of Mobile enacting a fair employment ordinance?

A We are always -- I mean, through the personnel board, equal opportunity employors.

Q I am talking about a city ordinance prohibiting discrimination by private or public employors in the city of Mobile?

A If we were actually doing it already, what is the need of an ordinance?

Q So you see no need for such an ordinance?

A Not as long as we attend to treating an employee fairly.

Q Are you in favor of the City of Mobile enacting a city ordinance making it unlawful for persons to buy residences on the basis of race?

A As long as the end is being accomplished, whether or not you have an ordinance would seem to be superfluous. If we are, in fact, allowing people to do these things. I don't see any point in having.....

Q You say we are allowing?

A I did not say that. I say as long as people are being allowed.

Q Are you aware of whether or not people are being allowed wherever they want to buy?

A I have heard absolutely no complaints.

Q Do you know whether or not there have been complaints filed in Federal Court under the federal laws?

A I don't know.

MR. BLACKSHER:

The Court can take judicial knowledge of its own records, but I know of and have handled at least eight cases. I think the Court can also take judicial notice that the Federal Fair Employment law contains a provision through which Congress has expressed a preference for local governments to enact their own Fair Employment laws to which the Federal Court must defer, if there are same.

A Let me say this, I am certainly in favor of people being hired in an equal opportunity way and being allowed to live where they please.

MR. BLACKSHER:

Are you in favor of enacting an ordinance prohibiting the burning of crosses in the City limits of Mobile?

A I think it is probably illegal to do that on public right-of-way all ready. Now, as to whether or not -- to say it is illegal to burn a cross on private property, if someone decided this, that they wanted to burn a cross or anything on their front yard and it didn't violate the environmental rules or anything, then I don't know that we should properly deny him the constitutional rights to burn whatever he pleases in his front yard.

Q What about this cross that was burned on Cottage Hill Road in front of .....

THE COURT:

I think what he is asking you is with reference to an ordinance of someone burning a cross on someone's property who is not there, is that what you are getting at?

A Yes. I am certainly in favor of prohibiting, by law, such as a cross burning that would be apt to upset the commun i ty in any way. I think if we could prohibit it by law properly without violating someone's constitution

rights, I think it should be done, yes.

MR. BLACKSHER:

When you were campaigning in 1969 -- I realize you were unopposed in '73. Therefore, I presume you didn't do much campaigning in '69 when you were campaigning for this office.

In your campaign, did you advocate fair employment opportunitites?

A I think probably I made the same general remarks that I was in favor of everyone being able to work and earn equal with others.

Q Mr. Doyle, do you disagree with all of the white and black politicians who have testified in this trial so far that a black candidate running at large in the City of Mobile.....

THE COURT:

Are you going to be with him much longer?

MR. BLACKSHER:

No, sir.

THE COURT:

The reason I say, it is twelve and we might as well let him come back after lunch. If we can finish up in five minutes or so, go ahead. Mr. Arendall, do you have rebuttal?

MR. ARENDALL:

Just for a couple of questions.

THE COURT:

Are you planning on being here this afternoon?

A I would just as soon go and come back to finish up.

THE COURT:

All right.

MR. BLACKSHER:

I was going to ask you if you agreed with the other people that have testified that a black candidate would have little or no chance winning an election running at large in the City of Mobile?

A Well, I have always said the politics is the art of the possible and if you are given certain ingredients, I believe anyone can win an election.

If you have a willing candidate and if you have enough money and if you have a program that you can sell to the people in a proper way I believe anyone can be elected to office. I will add, however, that I think both blacks and women have less chance.

Q All other things being equal, Mr. Doyle, would you personally be in favor of single member districts out of which the Commissioners or councilmen of the City of Mobile would be elected?

A I believe that the present form of government has

Supreme Court, U. S.
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APPENDIX

VOLUME II — Pages 306 - 620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT FILED JUNE 27, 1978
PROBABLE JURISDICTION NOTED OCTOBER 2, 1978

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(RECESS)

THE COURT:

All right. You may proceed.

MR. ARENDALL:

If your Honor please, during the noon recess, Mr. Doyle checked his secretary's calendar and it appears that the call from Mr. Clint Brown came in on April 8th, a Thursday, sometime between eleven-thirty in the morning and three-thirty-five in the afternoon, the exact time was not noted, because he accepted the call without his secretary making some notation that he had called at a certain time and it appears that the meeting with some of those who were concerned was held the next day, that is April 9th. So that it could properly be referred to as a Friday meeting rather than a Thursday meeting.

My understanding is that Mr. Blacksher's own notes, to the extent that he has them, indicate that that is correct.

THE COURT:

Fine. Thank you. Are you through with the witness?

MR. ARENDALL:

Yes, sir.

THE COURT:

Whom will you have next, please?

Q Now, Mr. Mims, in your 1965 race for the City Commission were there seven candidates including the then incumbent, Mr. Charles Trimmier?

A Mr. Trimmier was a candidate and I am sure that number is correct.

Q I will ask you whether or not, in that election you had a runoff between yourself and Henry Luscher, Jr., whose father had previously been a member of the Commission?

A This is correct.

Q In 1969, were you again opposed by Mr. Henry Luscher, Jr., as well as Charles F. Cooper and were you re-elected without a runoff?

A This is correct.

Q In 1973 were there six candidates, including Alphonso Smith and Lula Albert, who were black?

A This is correct.

Q Did you win in that race without a runoff?

A I did.

Q Mr. Mims, in that race did you seek black support?

A I have always sought black support.

Q Did you have any blacks active in your political campaign?

A Yes, I did.

Q Could you identify any blacks who gave you particu-

larly strong support?

A Well, there was Reverand Tunstall, and Mr. Evans and a number of other blacks who played a good part in my campaign for re-election.

Q Did you visit the non-partisan voters league?

A Not in the '73 campaign. When I ran in 1965 I was screened by the non-partisan voters league.

Q Did yo u go to the polls in 1969 and do you remember any of the activities of Mr. Beasley, at that time?

A Yes, I do.

Q Tell us about those.

A Well, it has been my policy, every since I have been involved in politics, on election date, to make as many polls as possible and, on that particular election day in 1969, Mr. Beasley was, if my memory serves me correctly, standing at the ward ten balloting place on Davis Avenue and it was my understanding that he was actually discouraging black people from coming to the polls and participating in the election process.

Q Mr. Mims, before we go into details with respect to your responsibility as public service commissioner, I would like for you to outline for the Court the basic set up for the supplying of various governmental services to Mobilians? First, Mobile Water and Sewer Board, what is that?

A Well, the Mobile Water and Sewer Board is an entity separate from the City Commission. The members of which are appointed to that board by the City Commission and this board has the responsibility of providing water and sewer service to the citizens of the City of Mobile.

Q Is it established by State law?

A This is correct.

Q Is Mr. Milton Jones a black, a member of that board?

A He is.

Q Does that board handle City drainage matters?

A Not storm drainage matters.

Q That is a function of the City government, itself?

A This is correct and, under the specific duties of the public works commission.

Q All right. Mobile County Health Department. Would you give us the relationship of that unit to the City government?

A Well, the Mobile County Board of Health has members who serve at the pleasure of the County Commission, if I am not mistaken. The City Commissioners do not appoint to this board.

However, by statute, by State law, each municipality within the County, as well as the County, has to contribute to the Board of Health and in the case of the City of Mobile

we contribute far more than the amount that is prescribed by law. I think we support the Board of Health at the tune of two dollars and forty cents per capita when the State law actually requires sixty cents, if I am not mistaken.

Q Mobile Housing Board?

A The Mobile Housing Board is also a separate entity and its function is to provide public housing for the City of Mobile and the members of that board are appointed by the Mobile City Commission or more specifically the mayor, who is serving, at that time.

Q Is that the agency that has been charged of public housing here and works with the Federal agencies in that regard?

A This is correct. They work for closely with HUD and the other Federal agencies and, in the past, had been designated as our urban renewal agency in the City.

Q Was Mr. John LeFlore a member of the board?

A He was for a number of years.

Q Is there currently, on the board, Mr. John F. Grey, who is black?

A He is black, yes.

Q And he is on that board?

A This is correct.

Q Mobile County Personnel Board?

A Well, the Mobile County Personnel Board is certainly separate from the City Commission. In fact, in many cases has more power, in my opinion, than the City Commission, because it tells us what to do.

It is a three member board and these board members are selected by a supervisory committee that is made up of one representative from each of the participating governmental entities.

Q That would be the City of Mobile has only one member on the supervisory committee?

A This is correct. And I think there are seventeen members of that committee, and it has been a contingen of the City government for a long time that there is a terrible inadequaty that exists here inasmuch as we are called on to pay fifty-five percent of the operating costs of this board, yet we only have one vote out of seventeen in selecting the board members and, of course, the board members then select a director and they operate the program and screen all applicants for job opportunitites in the City as well as in all of these other governmental agencies.

Q When the City considers that it wants someone to -- or wants to fill a position on the City payroll, what procedure is followed?

A Well, if we want a secretary, for instance, a position

is opened for secretary or a position has been vacated, and we need to fill that vacancy, we notify the Personnel Board that we need to fill this vacancy. They, in turn, furnish us with a certified list of qualified people.

In other words, when we get the list from the Personnel Board we have the assurance that the names on that list have been examined and screened and they are qualified to do whatever it is that we need to have done and, in this case, we are talking about a secretary. So, we have five names on the list, say, and then we have the privilege of selecting from the top three and every vacancy within the City, with the exception of the City Attorney and one or two appointed positions, every one of them are handled just this way.

Q I understand they give you a list of five names, but you may only select from the top three?

A Well, I just used the number five, there could be ten on the list, we still can select only from the top three.

Q Out of curiosity, why do they give you more names than three, then?

A Well, these names move on up the list. Say there are ten names on the list for stenographic secretary, within the system and the City of Mobile this week needs a secretary and we take the one right off the top. Well, then, the number

two person moves up to number one and say maybe the County might need a secretary and they can select from that top three.

Q I see. Are there any other agencies that are actually not part of the City of Mobile's government that perform important function in providing public services that I have not asked you about?

A Well, we have recently set up the Mobile Transit Authority that handles the public transportation for the City and then we have an interim airport authority that assists the airport commissioners and the City Commissioners in the operation of the airport.

Q Both of those established under State law?

A Well, the transit authority is under State law and it is my understanding and we hope some day to have a permanent airport authority, however, at this time, it is kind of an acting authority, for lack of a better word.. We have used interim airport authorities.

Q Does the City subsidize bus service in Mobile?

A We do to the tune of three hundred thousand dollars a year.

Q Would you give us any estimate as to the percentage of blacks and whites respectively who ride the buses?

A Well, I am sure I am correct in saying that the largest

percentage of riders would be blacks and it is my understanding that only four percent of the people of Mobile actually use the service in any one given day.

Q That is both black and white?

A Right.

Q Would it be fair to say that an overwhelming number of the actual riders are black?

A This is correct.

Q Now, let's go to City committees, Mr. Mims. I don't know whether you were present in Court or not, but the Plaintiffs have introduced as their Exhibit 64 a list supplied by us at their request of all the boards and committees and so on that are or have been around Mobile in recent years and I am just going to have to go down them one by one.

The board of adjustment, is that an agency required by State law?

A Yes, and it is one of the more active boards.

Q What does it do?

A It rules on variances. For instance, if the person wants to add on to his house and build a garage and it is going to go over near the line closer than the six foot that is allowed, then that person would come before this board of adjustment and get a variance.

Q Doesn't he first go to the City planning commission and then to the board of adjustment or does he?

A No. I don't think so. The planning commission is another planning function that I imagine we will get into later.

Q All right. Of the seven members of that board, is one of them black?

A Yes, he is.

THE COURT:

Just one minute. Please state for me the function of that board.

A Your Honor, the function of that board is to grant variances.

THE COURT:

Zoning laws?

A Well, we have a zoning commission, too, that acts on property of two acre plots and larger, but say you have a plot that was smaller than two acres and you wanted to get a special exception to put a special business or expand your house beyond the normal limits or something like this, you would come before this board of adjustment and ask for an exception and they hear all of these cases and either grant or deny your request.

THE COURT:

Mr. Blacksher and Mr. Arendall, for quick reference for study in the future, if there is no objection, I am going to make some pencil notations on the Exhibit, for instance, like board of adjustments set up by State law. Any objection to me doing that?

MR. ARENDALL:

No, sir.

MR. BLACKSHER:

No, sir.

THE COURT:

Let the record show that any notes on here will be made by me in pencil and if the attorneys have any objections when it is over with, I will hear from you. Go ahead.

MR. ARENDALL:

Mr. Mims, the board of adjustment would also handle, would it not, what are called applications for exceptions from zoning ordinances as, for example, when jacinto port wanted to put the fragnation plant out there on the jacinto port property. They had to go to the board of adjustment to get a so called exception from the zoning ordinance, did they not?

A I am sure this is correct.

Q The next on the list if the air conditioning board.

Is that appointed by the City, itself?

A Yes. But there are some requirements that -- I don't have the ordinance in front of me. There are some specific regulations as to who goes on there. In other words, it has to be someone who is familiar with the air conditioning or refrigeration -- in other words, you don't pick someone who doesn't know anything about that.

Q What does this board do?

A Well, they screen the applicants for refrigeration and air conditioning licences, as I understand it.

Q Well, let me read something to you and ask you if this sounds approximately correct.

The qualifications for membership on this would be one, air conditioning refrigeration mechanic who is nominated by the Mobile Chapter of Refrigeration Service Engineers Society. One person whose principal business is registered air conditioning and heating firm nominated by the Mobile Mechanical Contractors Association. One who is nominated by Mobile Air Conditioning Contractors Association. One independent practicing mechanical engineer registered in the State of Alabama and one representative of the public.

Does that sound about right?

A It sounds like it is.

Q Now, the next one is the architectural .....

THE COURT:

Wait a minute. I didn't get the function of that board.

A That board, as I understand it, your Honor, screens applicants for air conditioning licenses and what not, anything to do with air conditioning and refrigeration. The purpose is to make sure we have qualified people to come to our places of business or your homes. In the event you call an air conditioning man you can be assured, if he is functioning in the City of Mobile, he is qualified to work on your air conditioning and not flim-flam you, so to speak.

MR. BLACKSHER:

Your Honor, I don't think that guarantees my air conditioning work, does it?

MR. ARENDALL:

The next on the list is architectural review board. Tell us what that does.

A Back to the architectural review board, the board would review the plans on any remodelling projects or any alterations to any building that might be in a historic district. The City of Mobile has several historic districts and you have to go before this board before you can make any alterations to a building in these districts and this is to assure that the district remains historic and all the buildings are compatible with the period, whichever period you may be

dealing with, and again these members are from specific organizations such as the historic development commission has a member. The preservation society and various other organizations make recommendations to us as City Commissioners and we appoint to this board.

Q The American Institute of Architects is also recommended to you by the Mobile Association of Architects?

A This is correct.

Q Next on the list is the audiotorium board.

A Well, the audiotorium board is an active board and it is set up to assist the Commissioner in charge of the operations of the audiotorium as well as the City Commission in the operation of the audiotorium that serves the entire community.

Q Of the twelve members are three black?

A I am sure that is right.

THE COURT:

That is what the Exhibit shows.

A It varies, from time to time. I think there have been more and there have been less.

MR. ARENDALL:

There has been some reference in this case to Mr. Gary Cooper who has testified. Was Mr. Cooper, at one time, a member of the audiotorium board?

A Yes, he was. I appointed him.

Q How did he happen to get appointed?

A Well, Mr. Cooper walked into my office one day. I had never seen him before in my life.

He was tall, handsome, black man and introduced himself as Gary Cooper and I said, "I am glad to know you." We chatted for a few minutes. He said he had just returned from the military. He had been a major in the Marines or whatever branch of the service he was in and we had a nice long chat.

He expressed an interest in civic affairs and the next time an appointment came open on the board I appointed Mr. Cooper to the audiotorium board which, I think, was his first civic appointment after returning from the military.

Q Mr. Nims, is it fair to say that on many of these boards and committees it is difficult for the City to get people willing to serve and if someone will show some interest in participation in civic affairs they likely can get appointed to most anything they want to?

A This is correct. We look for people we can appoint to boards and commissions. You just don't go out and, you know, reach in the sky and get a name of someone, you don't know a thing about or don't know anything about their performance or don't know that they even have a desire to serve.

We try to put people on these boards that have an interest in the particular area of responsibility and people who are willing to serve.

Q What is the Mobile beautification board?

THE COURT:

Does the City appoint all members of the audiotorium board?

A Yes, your Honor.

THE COURT:

All right.

A If I might add, we try to divide these between the three commissioners. If there is twelve members on the board, then four would have been appointed by one commissioner and four by the other and so on. You ask about another board?

MR. ARENDALL:

The Mobile beautification board?

A Well, the Mobile beautification board was set up several years ago to do just what it says it does, try to beautify the City and make it more beautiful and engage the community in civic pride and clean up programs and things such as this.

Q Does it largely relate to shrubbery and things of that sort, or what?

A Well, it has had, as its projects on a number of occasions, the planting of shrubs along various boulevards

in different sections of the City, yes.

Q Mobile bicentennial.....

THE COURT:

I want to know who appoints these, each one of them?

A The City Commission.

THE COURT:

All right. Go ahead.

MR. ARENDALL:

Q Mobile bicentennial community committee. Who appoints it?

A The Mobile City Commission set up this committee for the special purpose of celebrating our bicentennial and they have been quite active during the past year and, at this point, they are phasing out and cease to be after this year.

Q Central City Development Authority. What is that?

A This is a fairly new organization that has been set up to try to rejuvenate the downtown area of the City as well as an area just west of the downtown corridor and it reaches out to the loop area and it is very active in trying to restore a lot of the area that could, on the other hand, deteriorate.

Q Mr. Mims, I notice from Exhibit 64 that at least, at the time that we gave that information to the Plaintiffs, that committee only had one member. Has it gotten any more

since then or do you know?

A Well, yes. There are several. In fact, one of the members, I think, just passed away. The president of Gayfers was on it, I know, and Mr. Van Antwerp is a member and Mr. -- the man with Title Insurance.

Q Goebil?

A Goebil is a member and I think the three City Commissioners serve on this authority, also.

Q And the downtown Mobile Unlimited, as a director?

A Yes. He is on it.

THE COURT:

All appointed by the City?

A Yes.

MR. ARENDALL:

Q This, basically, is suppose to have representation of people who have business interests in the central City?

A This is correct.

Q Board of examining engineers?

A Well, I don't have the Exhibit in front of me, but this is another one of those similar to the air conditioning board. There are specific requirements that go with these appointments. You have to have engineers and representatives of these various groups.

Q Membership is appointed by the City?

A Yes.

Q But it is with reference primarily for people getting licenses to engage in the business of practicing electricity here, doing electrical work, is that the purpose of it?

A Did you say electrical?

Q I am sorry. Engineers?

A This has to do with stationary engineers, I think.

THE COURT:

Stationary engineers?

MR. ARENDALL:

I see what it is. Would the qualifications for membership on this be a practicing engineer having not less than five years active experience in a management of stationary engines and boilers?

A Right.

Q I guess this is sort of a safety group, as far as whatever stationary engineers are?

A Let me give you an example. The jail, we have boilers, and we cannot operate those boilers unless a stationary engineer is on duty and that is to keep the thing from blowing up.

Q The next thing is the board of electrical examiners. Is that appointed by the City?

A Yes, it is.

Q My notes indicate that the qualifications here are appointed by the Mobile Electric and IBEW number five zero five, which is a union and by Alabama Power Company; is that right?

A This is correct.

Q What do they do?

A Well, they examine applicants for electrician licenses. In other words, we want to make sure that the people who have a license to do business in the City of Mobile are qualified and they have to go before this board and they are questioned by people who know something about electricity.

Q The next one on the list is Citizens Advisory Group for the mass transit technical study. Is that appointed by the City Commission?

A Yes, it is. That was in compliance with some State and Federal highway administration regulations and this group is not active any longer, as I understand it.

Q That has been taken over, its function, I suppose, have been taken over by this new transit authority that has been established?

A Well, not necessarily. This had to do with major arteries and these people represented the community and looked into the plans and did research and discussed the impact.

This artery -- I think we are talking about the Congress - Donald Street artery.

They talked about the impact it would have on the community and so forth and so on. To the best of my knowledge, it has served its purpose and is no longer active.

Q I am not sure, Mr. Mims, that I understand, because the next list on here, the next on this list is Citizens Advisory Committee, Donald - Congress - Lawrence Street and Three Mile Creek freeway, is that the same group as the mass transit study technical group, are they the same?

A No. I had the two confused. The one I had talked about, that had served its purpose. I am talking about the Congress, Donald group.

Q You had determined what the location of that freeway would be and that kind of thing?

A Right.

Q What about the other one, advisory group for the mass transit technical study?

A Well, that is some of our staff people, if my memory serves me correctly. I think Mr. Peavy serves on that committee and various technical staff people.

Q The Exhibit indicates there are eight members of whom three are black. Does that help refresh your memory on that?

A I couldn't tell you, to save my life, who they are. So, you will have to pass on that one.. I am sorry.

Q The next one is the codes advisory committee. Is that appointed by the City Commission?

A Yes, it is.

Q Does that committee relate to drawing up codes, as far as building codes are concerned?

A This is correct.

Q Mr. Mims, I believe I am going to give you a copy of this Exhibit 64, if I may, so it might help you remember what each of these organizations are?

A Well, we often say we have fifty-seven varities here on these boards. So, it is kind of confusing.

Q I will ask you if the qualifications for membership on the codes advisory committee; an architect, one structural engineer, a member of the American Society of Civil Engineers. one mechanical engineer, a member of the society of heating and refrigeration engineers, one electrical engineer, a member of the American Institute of Electrical Engineers and the engineer of the city of Mobile; one member of the Building Trades Council; one member of the Association of General Contractors; one member from the Mobile Home Builders Association; and one member from the Mobile Real Estate Association; and one member of the Mobile Air Conditioning

contractors. Does that sound about right to you?

A Yes, it does.

Q Now, actually, these building codes normally follow the so called southern building code, as worked up in municipalities all over the south and perhaps all over the country, do they not?

A This is correct.

Q The next on the list is the commission on progress. Is that appointed by the City Commission?

A Yes, it is.

Q What is it?

A The commission on progress is actually a bi-racial committee and that was the title or the name of the committee for many years, a bi-racial committee of the City of Mobile, and it was at my suggestion a number of years ago that we change the name to Commission on progress, because we were dealing with a lot of matters other than race oriented matters.

Originally it was set up to deal with the race problems in our community and, over the years, met a great need in the community.

Q Now, did it, for example, have anything to do with a Mobile restaurant downtown being integrated before they were elsewhere in the State?

A Yes, they were.

MR. BLACKSHER:

Your Honor, I object to counsel testifying.

MR. ARENDALL:

I think it was leading.

Q I will ask you, were there any informal discussions and arrangements made that did lead to the integration of downtown lunch counters?

A Yes.

Q At what point in time did that occur with reference to other cities in Alabama?

A Well, it was during the sixties when there were a lot of turmoil not only in this community but in many communities and this bi-racial committee as it was known at that time, worked long and hard to assure that black people would have free access to any place they desired to go, not only restaurants, but we had, one time, a man working to see that blacks were hired in the banks and in the savings and loan businesses and in the downtown businesses and we went to a great deal of effort to see that black people were put in these responsible places.

Q Those efforts have your personal support and assistance?

A Well, absolutely.

THE COURT:

Just a minute. Who appointed the code advisory, the City?

A Yes, sir.

THE COURT:

Commission on progress, the City?

A Yes.

MR. ARENDALL:

Q The next one is the educational building authority. Who appoints it?

A This is no doubt a City appointed board, because if I am not mistaken it is one of these propositions where this board is used as a vehicle whereby financing can be obtained for educational purposes. I am not sure if this is the University of South Alabama group or which group, but we have several, if my memory serves me correctly that we appoint three to five members to this authority and then bonds are sold and this educational facility retires those bonds.

Q You think this must be one of the industrial revenue agencies where they get approval of the city and get themselves incorporated and they sell tax exempt bonds in aid of a public welfare type of program?

A Yes.

Q Mobile area public higher education foundation?

A This would be the same type of entity set up strictly for -- as a vehicle where these funds can be obtained in the facility built for public use.

Q Find Arts Museum of the South at Mobile. Membership there appointed by the City Commission?

A Yes. And normally we appoint people who are interested in fine arts, people who express interest in the museum and in some cases, people who have made sizeable contributions to art in the museum in Mobile.

Q This is the committee that is in charge of running what we use to call the art gallery in municipal park; isn't that correct?

A This is correct.

Q Are the nominees for it submitted by the Mobile Art Association, the allied arts council, the art partons league, the art gallery board and the Mobile County Commission and the City Commission?

A This is correct.

Q Fort Conde Plaza development authority. Is it appointed by the city?

A Yes, it is, and this is an unusual arrangement. The three City Commissioners serve on this authority as well as four other people who represent the interests within that

plaza. In other words, some of the owners of property or representatives of owners of property and, in one case, Mrs. Bester Ward represents the Fort Conde Charlotte House, which is a historic museum within that complex. The purpose of this authority is to promote that plaza area.

Q And to get private industry and businesses to develop things that would be consistent with the historical area?

THE COURT:

This Exhibit only reflects four members. I assume then that you left off the City Commissioners that had membership?

A Apparently, your Honor.

THE COURT:

All right.

MR. ARENDALL:

Q Mobile Historical Development Committee. Is that appointed by the City?

A Yes, it is. We have certain stipulations as to who goes on there. In other words, various groups make recommendations, normally people interested in historic development.

Q Let me read some names to you and see if this sounds about right. The Allied Arts Council, the American

Association of University of Women, American Institute of Architects, Art Patrons League, Colonial Danes, Three City Commissioners, County Board of Realtors, Mobile Jaycees, Women's Architectural League, downtown Mobile Unlimited, Fort Conde Charlotte House, Colonial Danes, Historical Mobile Preservation Society, Historic Mobile Tours, Inc., Jaycettes, Junior League, Chamber of Commerce, County Board of Commissioners, Oakleigh Garden Society and Richard's DAR House, does that sound about right?

A Yes.

Q Independence Day celebration committee?

A Well, this is a committee that has been appointed by the City Commission that started back in 1972 when we decided we need to have an Independence celebration every year. This committee puts on the 4th of July celebration held at Ladd Stadium.

Q How many people did you have this year?

A We had thirty-five thousand people.

THE COURT:

How many does that Ladd Stadium hold?

A About forty-six thousand, something like that.

MR. ARENDALL:

The next one is the Industrial Development board. Is this another one of these financing arrangements?

A Yes, it is.

Q The next is the Malaga Day Committee, is that .....

THE COURT:

If you don't mention who appoints them, I assume the City appoints them.

MR. ARENDALL:

Yes, sir.

Q Mr. Mims, unless the City does not appoint them, let us know, otherwise I won't even ask you the question. We will just assume the City appoints them.

A On this Malaga Day Committee, I am not sure that is even still in existence. It could be or could not be.

We have a sister city's program and Malaga, Spain is one of our sister cities and we have had some celebrations here called Malaga Day celebrations and I am not even sure that committee is still funding.

Q If members were a group who went to Malaga in 1965 and got the sister city thing going.....

A They have been the prime movers of this Malaga Day program.

Q The Mobile Housing Board. Now, that is a highly significant group, is it not?

A The Mobile Housing Board is one of the most important boards that we have and simply because it provides public

housing and meets the need of so many people in the community. This is one of our most important boards.

Q And I asked you about that, of course, in my earlier examination?

A Yes.

Q Next is the Mobile Medical Clinic Board - psychiatric. Is this another one of these internal revenue bond organizations?

A It is a vehicle for financing.

Q Yes. And the Mobile Medical Clinic Board, Tranquil Aire, that was a vehicle for financing the building where Tranquil Aire is located?

A Yes.

Q The Port City Medical Clinic Board. That is another such organization, is it not?

A That is correct.

Q The next is Mobile Medical Clinic Board, Springhill.

A Yes. This is correct. If I might add here, your Honor, the City Commission has very little, if anything, to do with these boards once we make these appointments.

In other words, we have recommendations made to us and we try to put responsible people on these boards and once the financing is arranged then really there is nothing more for us to do. So, we have a lot of -- it looks like

a lot of boards here, but some of them we don't have much to do with.

Q Mr. Mims, I will ask you if this isn't a typical way, three doctors decide they want to start a hospital and they want to arrange financing through tax exempt bonds and they come to the City Commission and say that three of us are getting ready to build another hospital at such and such a place and we need one of these industrial revenue boards created. Would you appoint the three of us or maybe they say our accountants or our lawyers, some people to go in that they designate and y'all do what they ask you to do?

A This is the way that works.

Q The Medical Clinic Board of the City of Mobile. The Medical Clinic Board, - second, that is the same kind of thing?

A Right.

Q The Mobile Medical Clinic Board, the same kind of thing?

A Right.

Q Now, we come to the Mobile Library Board. Is that appointed by the City?

A Yes, it is, and it is with the Commissioner in charge of the operation of the libraries.

Q How much money does the City contribute to the

libraries here, do you know?

A Several hundreds of thousands of dollars. I don't have that figure in front of me, seven or eight hundred thousand dollars a year.

Q Greater Mobile Mental Health Retardation Board. That is another one of those industrial development bond boards, is it not?

A Well, not necessarily. I think this is a requirement of the Federal government that we set up such a board and these Federal funds are channeled down through this board and then allocated to Mental Health and other things.

Q Does the City Commission appoint the members?

A Yes.

Q Is this the group that works in conjunction with the rotary clinic or elsewhere? What agency.....

A Well, they work with the Mobile Mental Health Center, I know that, and I suppose any other organ' ation that was in this business of helping the handicapped and they would go to this board and clear any application or what-not that they might have as far as federal funds are concerned, kind of a screening board, as I understand it, to try to bring it in altogether to keep things from going in every direction. If I am not mistakened, this is a fairly new arrangement here.

Q Pier and Marina committee?

A Well, at one time, we had wanted to build a public marina over here just this side of the battleship and we had high hopes of it becoming a reality until we ran smack into the EPA people and they put such a damper on us, you might say, that the committee has already served its purpose and we didn't accomplish anything.

Q The Mobile Planning Commission?

A The Mobile Planning Commission is an important commission, because it has to do with zoning and the planning of the City and many of the improvements that are being made today in the City of Mobile are end results of planning that took place ten years ago.

Q All right. Policemen and fire fighters pension and relief fund board?

A Well, this board, as I understand it, administers the funds and tries to get as much return on the money as they can so that they can meet the obligations of the fund.

Q Is this created under State act?

A I am not sure about that. I really am not. I know some of the people who serve on it, but I am not sure.

Q I will ask you if this sounds right to you that the fire chief is designated in an act creating the board and that the police chief is designated and that there are three bankers on it and one man owning his business and one who has his

own investment business, the basic purpose of this is to see to the proper investment of the funds that are ultimately to be paid out for pensions and relief for policemen and fire fighters?

A This is correct.

Q Next is the Mobile Tree Commission?

A Well, this is an important commission. If you want to get a tree cut, because you had better not cut one unless you go through them. We usually try to put people on this committee or commission that is interested in preservation of trees and I think it is a good committee and they work awfully hard to preserve the beauty of our City, namely our trees.

Q Next is the Neighborhood Improvement Council?

A Neighborhood Improvement Council, no doubt has done as much or more than any other group to improve our neighborhoods. They go into the neighborhoods and have meetings, encourage the property owners to upgrade their property, to clean up, fix up, paint up, and it is quite an active group.

Q Mr. Mims, there has been some testimony here from residents of various areas of the City with reference to what they feel are inadequacies in City services in their own areas?

A Yes.

Q Is this an agency that relates itself to that problem

or not?

A Well, the neighborhood improvement council has community meetings and they run articles in the medium and in the newspapers. Usually they will have the community that they are having the meeting in, the blow up of the map -- say it is going to be the Dog River area where I live or the South Brookley area, they would have a map of that area and they would they are going to have a neighborhood improvement meeting in that area and every citizen in that area is encouraged to come and express themselves, at that particular meeting, and they go into things like the code, what you need to do to bring your house up to standard, up to the code, and help people know how to improve their dwellings and their living conditions, and much has been done in these communities because of the neighborhood improvement council.

Now, they also, for instance, say they go into a community and citizens complain about the lack of street lights. Then Mr. Locke, who is the secretary of this improvement council, he would come back and write me a memo as public works commissioner in charge of the street lights, and say last night we met in Cottage Hill, or wherever it might be, and we found, in a certain area, the street lighting, in our opinion, is not up to the City policy or

the City standard. Then I would direct the electrical superintendent to go and make a survey of this area, come back then and give me his recommendation and if the area was not lighted in accordance with our policy then we would, as rapidly as we could, light the area in accordance with the City's policy.

Q What is the City's policy?

A On street lights?

Q Yes.

A We have a light on every corner and every two hundred and fifty feet down the street or mid-block, or at the end of dead ends, which is adequate lighting, and we received an award last year as being one of the best lighted cities in the United States.

Q Mr. Mims, I have references here to three different organizations, the names of which appear to me to be somewhat similar.

We have been talking about the Neighborhood Improvement Council that is headed by Mr. Joe Locke. There is a community service group, is there not?

A Well, no.. There may be a service community group, but you may have that confused with a program that I instituted a number of years ago that I call community service meetings.

Q What is that?

A Well, this is a program whereby I go into the neighborhoods with members of my staff, primarily, and on occasion we take someone representing the police and fire department and the parks department and other departments, but primarily people from public works and we go into the communities and have a meeting at a school or parks building or community building, somewhere centrally located as we could in the community and invite the public to these meetings and try to get input from the public and then go back and try to respond as rapidly as we can to the requests of the people.

Q What is the difference between the neighborhood improvement council and your community service meetings or do they just overlap?

A Well, they could overlap, but the neighborhood improvement meetings are -- they deal primarily with the upgrading of the homes, of the residences in a given area where the community service meetings deal mostly with the needs from a public works standpoint.

In other words, the drainage problems, the lighting problems, the street problems, sanitation services and things like this. What I was trying to do when I initiated this program several years ago was to get input from the people,

because it has been my sincere desire all along to meet the need of this community regardless of who they are or where they live. The only way to know the needs is to get out in the community and hear from the people.

The television people and more specifically, WKRG, for a period of a year or two, went to everyone of these meetings and taped these meetings and played a portion of the meetings back at a later date and they were not only viewed, -- the programs were viewed by the whole community. In other words, if we met in Toulminville, for instance, then the next Sunday or whatever, the whole area could see that we had had a meeting. And I might say, speaking of the Toulminville meeting, if I might, we have a swimming pool at Gorgas Park today and it is solely because of the idea that was brought up at one of these community service organization meetings and I came back to the City Commission with the idea and the City Commission approved it and, today, the kids are out there swimming this afternoon because of that.

Q Do you have these meetings, then, in the black areas as well as in the white?

A Yes. It has been my policy to have them in every area of the City. In fact, we took the old ward map and tried to put about three wards together and have a meeting in an area that would cover about three wards and then the

ward map was changed and so we quit using the old ward map and now we just go to different areas.

Last week I made Trinity Episcopal Church in an area called the Chapman Improvement area. Three or four weeks ago I met with a group out in the Carver Court area.

Q That is a black area?

A Which was a predominantly black area and then, a few weeks prior to that, we met with another group -- I will have to get my records to tell you where I have been over the last months, but we have periodic meetings out in the community with the people and, in addition to that, I make it a point to ride in these communities myself to know what is going on.

Q As long as I am asking you about things with somewhat similar names, what is the community development program?

A Well, the community development program of the City of Mobile is certainly not to be confused with another organization known as the community development project. We are talking about now the City of Mobile's community development program.

This is a program set up and we have a committee called the community development committee to make improvements in the communities throughout Mobile, taking advantage

of Federal funds.

Now, these Federal Funds, at one time, were designated. You would get so many millions of dollars for this and so many for that. Congress changed all of that and now they send the money down in a block, one lump sum, and then we, as public local officials, have to make a decision on where these monies are to be spent.

Now, in order for us to set priorities as three elected commissioners, we have established this community development committee that holds meetings in the various neighborhoods and we have set some priorities on these funds. So, this is what the community development program is.

Q That is the program that is headed by Mr. Barnett, is it not?

A He is one of the members of the committee. I think Jimmy Alexander may be is the chairman.

Q The Housing Board man?

A Yes.

What we did, if I might add, we put the planner, Mitch Barnett, the public words director, the Housing Authority Executive Director, the finance director, as well as the building inspection department head on this committee.

We felt like we had a cross section of the people who were going to actually get the work done once we initiated it. These people are going to be held to be responsible for carrying out these projects.

I am sure you have the map showing where all of these projects are and where this money is going to be spent and I am sure that will be introduced later on during this trial.

Q All right. I think I left out here and let's go back to it.

I believe we are now on the plumbers examining board.

THE COURT:

Just a minute. Let me ask him a question.

With reference to this neighborhood improvement council, I understand there is some ordinance or regulation or something in a city with reference to requiring people -- with reference to their homes to keep them in a certain state of repair and painted; is that correct?

A This is correct.

THE COURT:

Now, if that is correct, then the question I want to ask you is this neighborhood improvement council related to those matters?

A Yes, it does, your Honor.

MR. ARENDALL:

The plumbers examining board. I will ask you if these qualifications sound about right. The chief plumbing inspector, one master plumber, a member of the mechanical contractor's association, one master plumber, a member of the master plumber's association, one journeyman plumber and one representative of the public?

A This sounds correct.

Q And this is with reference to the licensing of plumbers?

A This is right.

Q The recreation advisory board. I see from Exhibit 64 that members of that board's term expired in 1974 and they were not re-appointed. What was the purpose of that board and what was the thinking about not re-appointing it?

A If my memory serves me correctly, the Commissioner in charge of recreation, at that time, proposed this advisory board and if I am not mistakened, he recommended these names to the City Commission and we appointed them and they were to help him with his recreation program. Now, I did not come in contact with these people.

Q So, you think I had better ask Mr. Greenough about that?

A I think you had better asked Mr. Bailey about that.

Q Mr. Bailey was the one?

A Yes, sir.

Q The South Alabama regional planning commission?

A The South Alabama regional planning commission is what it says it is. It is a regional planning commission. It is a three county operation and local officials, as well as appointed officials, serve on the regional planning commission and every application for Federal funding comes through this regional planning commission.

Now, what we have done, as far as the City of Mobile's government is concerned, we have appointed members of our regular City planning commission to this commission and, of course, you see the number there.

It says one black and six total members, but there are many blacks who serve on the South Alabama regional planning commission from the other cities and from the other counties that are represented on this commission.

THE COURT:

Total members of Mobile, though, is six; is that right?

A This is correct, your Honor.

MR. ARENDALL:

I believe I have already asked you about the board

of water and sewer commissioners.

Now, the employees insurance advisory board.

A This board was set up to help the City Commissioners select the right kind of insurance program for our employees. We selected persons from the various departments to serve on this board and to screen all insurance programs before these programs are presented to the City Commission for approval.

For instance, if xyz company were to come to my office this afternoon and say, look, we have a fantastic plan and it is going to cost three dollars a month and blah blah blah, and we want to put it on payroll deduction and we would send this xyz company before this board and let this board screen them and then if the board, representing all of the employees, thought that this was a fantastic deal and they wanted it and they would bring it to the City Commission and say we think this is great and we know these people can get more than the amount required. We have to have three hundred before we put anything on payroll deductions. And we say, okay. The committee approved it. You go out and get your three hundred and don't come back until you have your three hundred, because we are not going to put it on payroll deduction.

THE COURT:

I lost out on the board of water and sewer commissioners.

MR. ARENDALL:

I guess we can come back to that, Judge. This is the organization established under state law, which runs sanitary sewer and water for the city and, indeed, some outlying areas, doesn't it?

A This is correct. I might add, in addition to the housing board, this is, without a doubt, one of the most important boards that we have, because every family in the City of Mobile is affected by this board and we could have one black gentleman on this board.

THE COURT:

Although it is established by state law, does the City make the appointments?

A Yes, sir. We make the appointments.

THE COURT:

All right.

MR. ARENDALL:

This is the board that Mr. Von Sprecken is chief career man on; isn't it?

A That's right. He is the superintendent of the water and sewer board.

MR. ARENDALL:

We expect to have him here, Judge.

All right. The next one is Mobile County Hospital Board and I have some notation on my copy of this Exhibit -- I am not sure it is on the original. It looks like your typing and it says "Owned by University of South Alabama. City has no connection".

A I am not sure that this board even functions any longer. You know, we turned the hospital over to the university and they operate it. We have no connection with it any longer.

Q I see. Frank S. Keeler Memorial Hospital?

A I think they are out of business, also.

Q The Arts Hall of Fame committee. Do you know what that is?

A Well, it looks like one member and I am not sure who that is unless it is the recreation commissioner.

Q See if this sounds like a 1971 state act under which persons are to be elected to the State Arts Hall of Fame and must have background in arts and the City Commissioner has appointed a representative of the Mobile Art Gallery Board; does that sound about right?

A It sounds about right to me.

Q The next is Public Education Building authority. Is

that another one of these industrial revenue bonds?

A Yes. It is strictly a financing thing.

Q And the educational board?

A The educational board, no doubt here, is the group of employees that we have that screens the applicants for furthering their education. In other words, we try to co-operate with our employees as much as we can so that they might further their education.

In fact, the City Commission pays a portion of employees tuition, say, at the University and, say, patrolman Jones wanted to go to school at night and take up criminal law, or whatever, and he would make his application to the City Commission through this educational board and the board then would screen this applicant and make sure he is sincere in what he is trying to do and we have requirements that you have to stay with the City "x" number of years. I think it is three years after you get your degree or after you use this money or else you have to refund the money, but these boards screen these employees.

Q Members of that board are largely employees of the City, members of the public, or what type of persons?

A As I recall it, they are employees, department heads, and maybe someone from the personnel board on here.

Q Now, Mr. Mims, there has been a lot of testimony in

here about surface drainage in Mobile.

THE COURT:

Why don't we take a break right here. Take about a fifteen minute break.

(RECESS)

THE COURT:

All right. You may proceed.

MR. ARENDALL:

If your Honor please, I would like to apologize to the Court on an error in judgement that I made. Mr. Mims had told me that at four-thirty that he had to leave here in order to get to Santa Rosa Island to speak to some three or four hundred people. I told him that I thought we could have completed the examination and cross-examination. I have taken so long with my direct today that I doubt if we make it.

THE COURT:

Just go ahead and let him finish up tomorrow.

MR. ARENDALL:

Thank you, Judge.

Mr. Mims, your department has charge of Mobile drainage problems?

A That is correct.

Q Tell us generally about them and what you have done and indicate whether or not you have sought to treat fairly

the various black areas.

A Well, under the supervision of the public works commissioner, comes the general heading of drainage and, of course, the City of Mobile has been plagued with severe drainage problems for not only decades, but I would assume centuries. The ground or the topography here, the City is built on the river, as you know, and it all started right here near the river and moved westward.

It is very low lying areas and we had tremendous problems in the old part of Mobile with drainage. We have tremendous problems in the new part of Mobile with erosion and the sand washes down off of the hills into the low lying areas and clogs up the drainage systems in the old sections of the city.

So, for centuries we have had drainage problems. There has been a lot of talk about drainage for a number of years, but there was not an awfully lot done about it until recently.

When I first ran for office in 1965 and my advertising material and my brochures will substantiate this, that one of my main concerns was drainage and alleviating the problems that existed. So, the first thing I did was to try to establish some kind of systematic maintenance program and we gave

instructions to the public works superintendent and to all drainage personnel that these drainage easements were to be maintained on a periodic basis. We bought some of the finest equipment that can be bought to clean catch basins and to clean storm drains. Some of the most modern equipment to clean ditches like Three Mile Creek and One Mile Creek and Bolton's Branch and Saltwater Branch and the various others -- what we call unimproved drainage easements and it has been our policy, over the last ten years, to maintain these easements on a regular basis and testimony here during this trial has indicated that the city has cleaned these drainage easements on a periodic basis.

In addition to the maintenance program, the cleaning of these drainage easements, we have entered into what we call the master drainage program of the City of Mobile. For a number of years we tried to get into this and finally came to the conclusion that we were not going to ever get this drainage corrected until we just, you might say, go into it headlong and try to find the money and sell bonds and get the revenue or the bonds to do the projects.

So, in 1972 the City Commission met and agreed to the master drainage program. We have sold bonds, millions of dollars worth of bonds, to be paid over to the next number of years and we are making many improvements in areas of both

white and black where problems have existed for over a hundred years, in some cases.

I have gone into these communities and talked to our citizens, both black and white, about the problems and with the resources available, I think the City of Mobile has come a long way in improving the drainage in our city. Our master drainage program, as far as I am concerned, has been initiated and promoted without regard to race, whatsoever.

Q Let's see, what is the total estimated cost of that program?

A Well, we started out with about twenty million, but I imagine, by 1980, we will have spent thirty million dollars.

THE COURT:

What do you mean you started out?

A Well, that was our projected program, but inflation and other things have caused prices to go up and we had added to the project and .....

MR. ARENDALL:

Do you have outside engineering consultants to advise you with reference to that, or is this done by city personnel?

A Well, when we went into this program we assigned three engineering companies to this master drainage program and these engineers have certain water sheds assigned to them. We have three water sheds in Mobile; the Three Mile Creek water shed,

The Dog River - Eslava Creek water shed, and the Mobile River water shed. Every drop of water that falls into Mobile, goes into one of these three water sheds.

Each one of these engineering firms, Polyengineering, David Volkhert and J. B. Conversing Company, have one of these water sheds assigned to them and they are doing the designing of the storm water system in these areas. We have made a great deal of progress. There is not an area in the City but what you can't see some of the progress that has been brought about because of this drainage program and, in the years between now and 1980, the program that can be presented here shows our projected projects.

Q Has some work been done in each of the three water shed areas?

A Yes. This is true.

Q Approximately how much money have you spent so far on actual out of pocket expenditures, to date? Could you give us that figure?

A I can't recall, but it would be more than ten million dollars has been spent already on the master drainage program.

Q Do the engineers tell you that once it is completed that Mobile will then be adequately drained?

A Well, I don't think you would ever find an engineer or politician, either, that was in his right mind that would

say you would always be protected from a storm or flooding situation. Normal flooding conditions will be eased tremendously when this entire program has been completed, but if you have what they call a hundred year flood come, you know, the whole area could get under water. We can't protect the area completely from God's floods, you know.

Q You mentioned some white areas that have had this problems and I would like for you to mention some of those specific locations, if you will, please.

A Well, there is one project that we have under way right now that has -- where there is a need and the need has been there for a hundred years, I am sure. I know it has been there for over fifty years, because I know people who were born there fifty years or more ago.

Q Where is that?

A This is in the Laurel - Devitt - Monterey Street area and I might add that we had a community meeting there with some people, including Mr. Brown, whose name has been mentioned here and other testimony and I think he would have to admit that he got mighty good response out of the City government in this project. We're spending over a million dollars in the Monterey - Laurel - Devitt Street area. This need has been there, as I said, for low many years.

THE COURT:

I am familiar with Monterey Street, which is between Springhill Avenue and Government Boulevard. Is that the Monterey area you are talking about?

A Yes, your Honor.

THE COURT:

Does it go also south of Government Street?

A Monterey does.

MR. BLACKSHER:

Yes, sir. One block.

THE COURT:

The area you are speaking of is north of Government?

A Yes, sir.

THE COURT:

All right.

MR. ARENDALL:

Now, let's talk about drainage and some of these other areas that there has been some testimony about. There has been some talk here about Trinity Gardens, that area came into the City only in 1961, did it not?

A I believe that is when the vote was taken by the people in that area. It was in 1965, I believe, that services were provided and the people began to pay taxes.

Q Just in a general way, would you tell us what the basic problem is there, as you understand it, with reference to

drainage?

A Well, I will be happy to, because I have been in the Trinity Gardens area many times and must confess that the problem there is an unusual problem and it is mainly because the area lies between some railroads and down in kind of a low land or flat land that has been described here, in testimony, that was like a saucer, which is a good way to describe it, because it is going to take an awful lot of drainage to get the water out of the area and we have been working on it over the years and, with our community development program that we mentioned here earlier, we should be able to drain this area and then we can move on into the paving of the streets.

Q When it gets drained, where does the water go? On what water shed is it located?

A This goes into the Three Mile Creek water shed.

Q Isn't that going to compound your problems on Three Mile Creek that you heard testimony here about, the Crichton problem? Wouldn't that compound your problem?

A Any time you put more water into a stream, I guess you compound your problems. However, we have worked extremely hard to get Three Mile Creek cleaned out on the end near the river and we have spent thousands upon thousands of dollars dredging Three Mile Creek and we feel that, with

these improvements, as well as the study that is being made now by the Corp of Engineers and, incidentally, this bill was just passed whereby a hundred and fifty thousand dollars in planning money for the Corp of Engineers was set aside.

The Corp of Engineers fit into this Three Mile Creek, because Three Mile Creek runs into Mobile River and Mobile River is part of the Tennessee, Tom Bigby program. Anyway, we have a hundred and fifty thousand dollars planning money and the Corp of Engineers is going to help us with the drainage on Three Mile Creek.

Q There has been some talk, also, about drainage problems in the Plateau area.

On what water shed is that?

THE COURT:

Where does Three Mile Creek run into Mobile River?

A Well, it crosses Telegraph road north of here where the little bridge is where you see some little tugboats sitting there, right north of the State Docks, to be more specific.

THE COURT:

All right.

MR. ARENDALL:

Going back to Trinity Gardens for just a moment.

I understood you to say as soon as you could get your

drainage worked out there, then you would go in with street paving; is that right?

A This is correct and, if I might say this, one of my concerns naturally has been the streets of Mobile and the only unimproved streets we have left within the city, you might say, are located in the Trinity Gardens area. We have paved dozens of miles of streets in the last ten years in Mobile and we have a few left in Trinity Gardens.

It is absolutely impossible for us to pave these streets until we drain the area. We have paved some streets in Trinity Gardens, the ones we felt like we could pave and, you know, get by with, so to speak. Because it is absolutely money thrown away to go out and put asphalt in an area that you can't dry out and the streets will stay torn up all the time and fail and you will have a problem, sure enough problem, on your hands.

So, we have just about paved every street in the City of Mobile with the exception of those right there in Trinity Gardens which we hope to get as soon as we get the area drained as with these community development funds.

Q Now, there has been some talk about Plateau.

On what water shed is it, or does it have a drainage problem?

A Not what you would call a general drainage problem

like Trinity Gardens. I doubt if you could point to any community in the City and say it is completely free of all drainage problems.

But Plateau does not have the general problem as does Trinity Gardens.

Q There was some talk here about dead bodies getting washed away. Would you tell us about that, if you know anything about it?

A I think that was an exaggeration. It was called to my attention a year or so ago that there was a problem with a cemetary. We did some work around this cemetary and some of my staff people can elaborate on that more than I and get into detail on it, but we did do some work around the cemetary. I understand that this area was being used as a burying place down off the side of a hill and on down into what you might call a slew or spillway or drainage easement and I am sure that in case of a flash flood or something of this sort, the whole area was covered with water and it is very likely that some of the grave sites were covered with water, because the people are buried right on down into the low land.

I don't know where the health department has been, or whoever is supposed to regulate the cemetaries, but whoever is supposed to inspect cemetaries and regulate them, apparently were not stopping the burying of people down in these low

places.

I think you could safely say, in some places, when a flash flood came that the water, perhaps, covered the graves. As far as bodies floating around, I think that is an exaggeration.

Q There has also been some complaint about the drainage in the Crichton - Liberty Park area?

A Yes. There is a tremendous problem in that area. To my knowledge, it doesn't present any flooding problem, but there is a big ditch that comes down through Crichton that originates up about Pages Lane or back of Delchamps Shopping Center there and goes down by Nall Street and across Bayshore and Mobile Streets and on into Three Mile Creek. It is a huge drainage easement. The people in the area continuously are filling it with old tires and litter and furniture and the maintenance problem is tremendous.

Some homes have been built right up on the edge of the creek. We are aware of some of these problems, but we are also aware of the fact that it is going to cost several millions of dollars to correct this problem. It is in our master drainage program and it will be taken care of, but, as I say again, with the resources that we had available, I think we have done a fantastic job with our drainage program.

Q Mr. Mims, earlier in the trial I introduced, as Exhibit

80, a news release that you had issued on March 16, 1970. Would you hand him a copy of that, please?

I believe his Honor inquired as to whether this million one hundred and forty-one thousand three hundred and seventy-four dollars that is stated on the second page to have been the total expenditures between October, 1965 and March 16, 1970, was all spent in an effort to do something about the problems in Trinity Gardens?

A This is correct.

Q And is it fair to say, too, that during that period of time Trinity Gardens had produced only twenty-seven thousand dollars in property taxes for the City?

A I had our revenue people develope these figures and I am sure they can be substantiated.

THE COURT:

Mr. Arendall, are you suggesting that when an area of the city doesn't produce certain revenue, they are not entitled to certain services?

MR. ARENDALL:

No, sir. I am not. What I wanted to do was to ask him this next.

Mr. Mims, does not this demonstrate that the policy of the City of Mobile, with reference to the expenditure of public funds has been dictated by a desire to help a particu-

lar area that needs them as distinguished from just giving me back fifty dollars a year in services if I pay the City fifty dollars in taxes?

A Well, I can say emphatically that we have tried to provided these services in the Trinity Gardens area, because the area became taxable right after I was elected to office in 1965 and I began, as public works commissioner, to provide these services in the Trinity Gardens area. Prior to that time, they didn't have any service at all.

THE COURT:

I take it that your contention that the City provides services according to needs rather than according to revenue?

A Yes, sir. If I might add we can't always do everything everybody wants done in any given community.

MR. ARENDALL:

Now, I notice on the second page here, there is a reference to sewer installation and water installation and a note that two hundred and fifty-eight thousand dollars of federal funds had been secured and a further note that a portion will be returned over a ten year period in assessments.

Taking, first, the item of sewer installations, I had understood from your prior testimony that the Board of Water and Sewer commissioners were in charge of the sanitary

sewer development for the city in this area.

Would you explain how it came about that the City itself was in the picture here?

A Well, the water and sewer board was established, to begin with, in order that that entity might sell bonds and provide these services for the people. Over a period of years the board of water and sewer commissioners apparently reached their debt limit and they could not sell any more bonds. Then the citizens of Mobile, these in particular, Trinity Gardens, as well as thousands of others, came to the board of City Commissioners, at that time, and said, look, we want these services. We are in the city and we want these services. These people in Trinity Gardens came into the City and began to pay taxes in '65 and said we want these services and we go to the water and sewer board and say, look, you are suppose to provide these services and they say we can't provide the service because we are at our limits, as far as debt is concerned.

The City Commission turned around then and sold bonds and made these improvements and assessed part of the cost against the property owners and this is the only way these improvements could have been put in, at that time. I think it was a case of a city government responding to the needs of the people.

Q That would be true of the money as indicated here for water installation, I take it?

A Yes. They were both installed at the same time.

Q Now, you have mentioned briefly, among your duties as public works commissioner, is that of paving and you have spoken about that generally. Let me ask you a few general questions.

Where a subdivider desires to take a rather large piece of property and turn it into a lot sales venture, who puts in the streets?

A The developer.

Q Does he have to do that in accordance with City specifications as to the nature of the street and the underground drainage and things of that sort?

A Yes, he does, and then he turns them over to the City when he has completed the project.

Q Once they are inspected and approved by the City, they then become City streets, but it is the developer who puts them in; is that correct?

A This is correct.

Q Would it be fair to say that since the basic growth of the city has largely been to the western section of the City that many of the streets in that area have been paved by private individuals as distinguished by the City?

A Well, this is absolutely correct.

Q Then in those areas, however, where there have been no real estate developments in recent years the City, itself, has been the one to do the paving; is that right?

A On all unimproved streets where there were residences the City has gone in on an assessment basis and improved the streets and, as I said a moment ago, we have just about taken care of every one with the exception of some in Trinity Gardens.

Q Now, there was a lady here earlier in the case who -- no, a gentleman, Mr. Pettaway, who was talking about Lincoln Street.

I understood him to say that the people out there had always been willing to pay for an assessment for street improvements and then I introduced Exhibit 81 on that subject. Do you recall the Lincoln Street situation?

A I recall Lincoln Street quite well, because I set on a Reverand Mr. Smith's porch in 1965 and discussed the problem with him. I discussed it a number of times after that date with him.

It was not until about a year ago -- I don't recall the dates, that we first learned that these people were willing to pay an assessment. Prior to that time they wanted the City to put the streets in because they had problems and,

to the best of my recollection, they never indicated that they wanted to pay or would be willing to pay any portion of it. My position was that it was a hard surface paved street at the time and we had much greater needs in other areas and our responsibility is an awesome responsibility, when you try to establish priorities, and, in my opinion, the Lincoln Street project was not a high priority item, but when the people decided that they wanted to have a part in it and pay the assessment, then the City Commission moved ahead with the improvement program and it is under construction right now.

THE COURT:

What is the distinction about when the City pays for it? I assume when you say certain high priority areas where you do paved work without assessment, what makes the determination where you pave without assessment and where you don't?

A We don't assess, your Honor, on major streets. Take Airport Boulevard, for instance, that is a major street. Normally we try to get some federal or state and county participation in a project such as this. On all residential streets that we improve, whether it be low cost or regular curb and gutters and underground drainage, we do it on an assessment basis.

THE COURT:

Are all the streets in the area -- is Lincoln Street a residential section?

A Yes, sir. And as I said, it was not until they agreed to the assessment program -- let me explain the assessment program. We could go out and say we are going to assess part of this project to the property owners. We assess one-sixth of the cost of the project to the property owner. So, it still costs, out of the treasury of the City of Mobile, many thousands of dollars on most any kind of project, because one-sixth on each side of the street would be actually one-third.

If a project costs ninety thousand dollars, sixty thousand comes right out of the treasury where thirty thousand comes out on either side of the street.

Q What is your policy with reference to the construction of sidewalks? A number of black witnesses have complained because they don't have sidewalks.

A Well, it has been our policy to install sidewalks in any area where the people petition the City Commission for sidewalks, because we assess the cost of that improvement against the property. Our policy on new subdivisions is that they install the sidewalks. So, if a new subdivision goes in, before we accept the subdivision, the developer places the sidewalks on the property.

over the two-thirds or three-fourths of the people in the community to please the one-fourth or one-third.

Our normal way of handling it is for a community, the number of people -- ever how many to request the sidewalks and then we would try to initiate the program and have the hearing and move on with it.

MR. ARENDALL:

That probably is clear, but you would not, for example, assess for repaving Government Street, would you?

A No resurfacing programs are not done on an assessment basis. That is a maintenance problem.

We spend about two hundred and fifty to three hundred thousand dollars a year on resurfacing. Right now we have many hundreds of miles of streets that need to be resurfaced and in the not too distant future I will be coming to the Commissioners on my knees with hat in hand, so to speak, to keep our streets in good repair.

That comes right out of the general fund of the City and as a maintenance expenditure. We don't assess for resurfacing.

Q Do you believe, Mr. Mims, that under your administration that the black communities have been treated fairly with reference to drainage, paving, sidewalks and -- well, those matters?

A I most certainly do. I don't think I have ever -- in fact, I will be emphatic and say I have never denied any citizen a service that he expects with his tax money because of a certain color or social standing.

Q Now, there has been some testimony here about weeds and underbrush on large tracts, specifically about some property belonging to Mr. Meaher and located in the Plateau area.

What is the policy of the City with reference to large tracts?

A We have a state law and I am not familiar with the number and what not, but I know it is a state law that deals with noxious weeds. This law allows us to post a lot and cut it if the property owner does not cut it and assess it against his property. Our policy on large tracts of land, if we get a complaint from Mrs. Jones, who lives next door to this large tract of land, our policy is to go out and post a fifty foot strip around this ten acre tract or whatever it might be, and give the property owner who lives next door to this tract at least a clearing between them and the underbrush and the wooded area, so to speak.

Now, normally this is sufficient and most people are appreciative of the fact that they can get this strip cut next to their property.

A No, but on occasion Dr. Tunstill has been present with these other people to give me advisement.

THE COURT:

If I understand you correctly, you haven't formalized your campaign into committees?

A Well, not officially. We had people doing a lot of things in every campaign I have ever been in. When I ran for the United States Senate, Dr. Tunstill was a part of it and he was right there, but in these City races we welcome help from anyone of any color or any standing.

THE COURT:

Go ahead.

MR. BLACKSHER:

I didn't really understand your answer to the Judge's question, but I will move on to the next one.

Did you regularly, in all of your campaigns, have a campaign headquarters that was staffed by people during whatever hours you kept?

A Yes, we have.

Q Tell me the names of the black people who have staffed your campaign headquarters?

A We did not have black people in the campaign headquarters. My brother is my campaign chairman and he is very particular about who sees our list of supporters and people

who are helping us. He runs the campaign and I try to run the office after I get elected.

Q Jeff Mims is your brother?

A This is correct.

Q And he is chairman of the County Democratic Executive Committee?

A This is correct.

Q Now, about all of these boards and committees, Mr. Mims, would the Clerk please show the witness Plaintiff's Exhibit number 64.

How many of these -- can you point out the boards and committees on this list which, I presume, is comprehensive, to your knowledge, right, and contains all the boards and committees that the city has any appointing power to?

A So far as I know, yes.

Q How many of them, to your knowledge, are set up under State law as opposed to being established by city ordinance?

A I could not answer that.

Q What about the board of water and sewer commissioners? That is established under State law, isn't it?

A It is my understanding that it is.

Q Do you have any idea of how many of these or which of these boards and committees are subject to the control of the City Commission to the extent that the City Commission can

change the ground rules about what it is suppose to do, who it's members are and so forth?

A No, I don't. As far as I know, the water and sewer board, for instance, is charged with the responsibility for providing sanitary sewers, water service for the City of Mobile and I don't have anyone who would want to change that.

THE COURT:

According to my notes only two were established by State law, the boards, the South Alabama Regional Planning Commission, I assume, was established by either the State or some federal regulation, and that is the only ones that I have that indicate, besides the City establishing them -- well, is that true, the board of adjustment, the board of water and sewer commissioners, and the South Alabama Regional Planning Commission?

A Well, I think you would find the Housing Board would be -- has to be a State act that would allow a housing authority.

THE COURT:

Just one minute. What number is that?

MR. ARENDALL:

If I may, we have not researched this and I am really not sure. I believe all of these boards that will relate to licensing people are probably under some state law which

says that the various municipalities shall do such and such in order to issue licenses for contractors and electricians and plumbers and so on. We have not researched and I cannot make that statement.

THE COURT:

All right.

MR. BLACKSHER:

Well, concerning the board of water and sewer commissioners, Mr. Mims, have you made any appointments to that board personally?

A Yes, I have.

Q How many?

A Well, I regret to say that I think I have one appointment in all the years. It has worked around where I have one man on there, Mr. Dennis Moore. I have been in office eleven years and Mr. Moore is my one and only appointment.

There was some mix-up, if I might add, because of some people dying and some particular person appointed them and they felt that they should replace that person or fill that vacancy. Many of these people I have known and certainly have concurred in their appointment.

The late Bishop Phillips was a very close friend of mine and served ably on the water and sewer commission for

a number of years and some of the other people I know quite well and have utmost confidence in them. So, I am not complaining because I can't, you know, appoint but one person. But Mr. Moore I appointed a number of years ago and he has been reappointed at least once since then or maybe twice.

Q Mr. Moore is white, isn't he?

A Yes, he is.

Q I thought we established that Milton Jones is currently a member?

A Yes. He is and Mr. Jones is black.

Q And you were saying that Bishop Phillips was also?

A He was on there prior to Mr. Jones. Bishop Phillips was black.

THE COURT:

This shows no prior black members. Can you account for that?

A I did not prepare this. Reverand Bishop Phillips known by everybody around Mobile, was on there for a long time.

MR. ARENDALL:

Judge, we had this prepared by Irene -- no, Mr. Menefee prepared this. We gave some basic information to Mr. Menefee.

THE COURT:

Counsel for Plaintiff?

MR. ARENDALL:

Yes. Mr. Menefee prepared this and I will be frank to say that I didn't check it.

THE COURT:

All right. I am going to put one in parenthesis by that, prior black members.

Do you know whether or not you gave the information that Mr. Phillips previously served on that board?

MR. BLACKSHER:

Bishop Phillips and Mr. Menefee informs me that Mrs. Quinn identified the persons on this list who were black and failed to identify Bishop Phillips.

THE COURT:

All right.

MR. BLACKSHER:

So there are actually two out of the twelve people that have been on that board that have been black?

A I don't have that information before me.

Q I believe you testified, Mr. Mims, that you had some difficulty finding citizens to serve on these various boards.

Have you had difficulty finding people to serve on these boards?

A On the water and sewer board?

Q Yes, sir.

A Well, as I indicated a moment ago, I have only made one appointment that I could point to and that is Mr. Moore.

Q Did you have any difficulty locating someone?

A No. I did not, because I appointed Mr. Moore and I have not had an opportunity to appoint anyone else since.

Q You have given us an example of how Mr. Gary Cooper walked into your office one day and said that he wanted to participate and I believe you said that you had never seen him before and that provided you an opportunity to appoint him to some board.

A To the audiotorium board.

Q Isn't that a general problem you have in finding qualified black persons to serve on these boards is that you just don't know that many black persons personally, like you do the white people that live in your immediate community?

A I know a lot of black people, personally. I speak in black churches. I go to black meetings. I know a lot of black people.

You have to have people that express interest. My door is open to people. I have a meet the mayor day every Wednesday and I have people coming and going, blacks and whites and unless people express an interest in serving their community on a specific board or in a specific area then it is

not my policy to go out and pick people, you know, and put them on a board unless I know they want to serve and unless I know they have some interest in a particular area.

Q Are you saying that you have never appointed anyone to a board at your own initiative or at your own invitation, but have only responded to requests that were made in the first instance by other people?

A I have requested certain black leaders to provide me black lists of black people that would be willing to serve on boards. I know a lot of black people, but to have them say I want to serve or I will be willing to give so many hours a month, a very few of them have done this. I am going to be frank with you about that.

Q Who are the black leaders you requested to provide a list?

A Various people, ministers and various leaders in the community.

Q Name one.

A Well, the Bishop that I just mentioned awhile ago has provided some names over the years.

Q Bishop Phillips?

A Yes.

Q Who else?

A Reverand Tumstill, and Mr. LeFlore use to provide

some names.

Q Mr. LeFlore?

A And others.

Q And others? Others that you can't recall, now?

A No. I can recall. I just mentioned Dr. Carroll. In fact, of the business, I helped to get Dr. Carroll appointed to a state position.

Q Have all of these people provided you with a list that you requested?

A They would give me a name now and then. I doubt very seriously if anybody has given me a list of names. I rely on black people I know to tell me if a certain person wants to serve or will serve or is qualified to serve. I don't think because a person is black or white makes him necessarily qualified to serve in a given area.

Q You have requested, you say, a list of names, but whenever you have had a chance to want to approach the black community you have gone to one of these black leaders that you knew and ask them for a name, is that what you are saying?

A Well, yes.

Q So, what kind of occasions would prompt you to say well it is time for me to consider a black person for this board and I will see one of my friends, who is a black leader, and ask him for a name.

A What kind of an occasion?

Q What time would you do that? Everytime you had an appointment would you request the name of qualified blacks that you would consider along with other people or just certain occasions when this would come up?

A Well, on some of these boards, as it has already been indicated, you have to have engineers and architects and things like this and you get these recommendations from these various boards and committees and groups. They send in these recommendations.

On others, like the audiotorium board, if there is an opening coming up and it is important to me to make the appointment, then I will look over the list of people that I have confidence in and I might call.

Q You have a list that you keep at your desk of people that you have confidence in?

A I have friends that I have confidence in and I have friends that I don't consult for advice and then I have a lot of acquaintances and I am sure that every individual, whether he is in politics or not, has close associates, friends and acquaintances. So, if I were looking for a person to put on a board this afternoon I would call somebody that knew people out in that community, both black and white.

Q Out in which community?

A In whatever community I was trying to find or whatever area I was trying to find an appointment in.

Q Well, I guess that is what we are trying to get at is to figure out how you zero in on a community when you find out there is a need for an appointment?

A Well, if one of my appointments on the audiotorium board were to resign this afternoon and it was determined that this person was my appointment and -- incidentally, I appointed the first black to that board and appointed the first woman and the first woman black I appointed to that board and so if that opening were to come about this afternoon, then I would start researching within my own mind who I could fill that vacancy with and it might be that I would call a white person or it might be that I call a black person and ask for a recommendation, someone that was qualified to serve and someone in whom I had great confidence.

I have not made it a great practice calling up these people after they got appointed to a board and pull strings and treat them as a puppet. That is not my policy. I appoint people I have confidence in and on occasions some of them have disappointed me.

Q You said that there are a number of committees where you must select persons nominated by boards of architects or

engineers and what else did you mention?

A Well, some of these you have to have someone familiar with air conditioning, for instance, and air conditioning professional groups. I don't even remember what they are call, but they make these recommendations. I can't help it, because they don't have a black air conditioning engineer that they recommend to us.

Q Let's get something straight. You are not saying that there are no qualified black engineers or air conditioning people or whatever; you are not saying that?

A I am saying that I have tried to find a black civil engineer for eleven years and I don't have one yet on my staff.

Q There are no black civil engineers in Mobile?

A I have not been able to locate them.

Q Okay. Where do you look when you are looking for a black civil engineer?

A I have been told a number of engineers, including the engineering school at South Alabama. I have talked to people in other parts of the country who are in the public works field and I have talked to the commissioner of public works in Atlanta, who is a black man, and who is a civil engineer and he confesses he can't find black civil engineers and I have let the personnel board know that I would like to have a black engineer on my staff.

We go into every area of the City and deal with all of the people and I would like to have a black representative on my staff, but I have not been able to locate a black civil engineer.

Q Does that hold true also for architects?

A The only black architect I know is Mr. Jones, who is on the water and sewer board.

Q Do you know of any black architects employed with the Corp of Engineers?

A I think that is the problem, the federal government takes them all.

Q Just because he was employed at the Corp of Engineers didn't stop you from appointing him to the water and sewer board?

A No. You miss the point.

Q I am sorry, give it to me again.

A I am talking about as a staff person, now. I have looked for a .....

THE COURT:

You mean a full time employee?

A Yes, your Honor. I have looked for a black civil engineer to put on the staff full time with the City of Mobile and I have not been able to locate one.

MR. BLACKSHER:

We were talking about boards and committees.

A Well, if I can't find one to hire, I certainly don't know if I could find one to appoint to a board.

Q Well, you find an architect that you couldn't hire that you probably could have appoint to a board.

A He is the only black architect that I know and I am not trying to be smart. He is serving on our water and sewer board and he works for the Corp of Engineers and I imagine makes more money than he could working for us.

Q If I told you there were two other black architects working for the Corp of Engineers alone, would that surprise you?

A No. It wouldn't surprise me. I just don't know these gentlemen.

Q This Mobile Transit Authority you said was recently established and that is not on the list, is it?

A No. I don't think so, because it is fairly new.

Q How many members are on the authority and how many of them are black?

A Well, I have two appointments and I think the other two commissioners have two appointments and one of mine is white and one of them is black.

Q I am sorry, run that by me again.

THE COURT:

What is the total number?

A Six, your Honor. Each commissioner has appointed two.

THE COURT:

How many total blacks?

A One.

THE COURT:

That was your appointment?

A Yes.

MR. BLACKSHER:

Who was that black person you appointed, Mr. Mims?

A Marshall Robinson.

Q And yet the black citizens of Mobile are the overwhelming percentage of the patrons of the transit system. I mean, did that occur to the commissioners when they were appointing?

A Sir, I can only speak to myself. I put one black and one white out of the two. I don't know what else I could have done.

Q I think we have talked about this the last time we appeared in the Court together. One of the facets of the City Commission is that you are only responsible for you and not responsible for the others?

A I am responsible to the people of Mobile and I think I have met those responsibilities quite well.

Q By the way, concerning the transit authority, is it a fact that there are just aren't any bus routes that go north and south between the north end of town and the south end of town, you know, through Government Street? Don't they all have to go down to the foot of Royal Street and transfer there and go all the way back out again in one direction or the other?

A Well, the City of Mobile is so laid out to the core, that the central core is by the river and, over the years, the routes have all been designed to come into the central core.

Now, studies have been made by the new operators of the system and we have a professional operator who is helping the authority. They have some new route configurations designed. As far as them going right straight down from Prichard to Navco, I doubt very seriously if that will ever be. In this business I have found we have more expert traffic engineers and more expert civil engineers and more experts than you can shake a stick at and everybody says why don't we have a bus to run from Trinity Gardens to Navco interchange. That doesn't mean that people are going to ride just because somebody thinks that ought to be. This is like testimony given here earlier today that a traffic light ought to be at their corner, but it doesn't mean it is necessarily justified.

Q Who was that that said everybody wanted a traffic

light at their corner?

A I think it was brought out earlier in the testimony, I think Mr. Doyle said so.

Q Mr. Doyle wanted it?

A No. He didn't say he wanted one.

Q Okay. We have this board of adjustment, number one, looks like it is -- we have one black out of a history of sixteen total members. Do you know any reason why there were not any more blacks than that appointed to this particular board?

Is it a question of availability of some particular skill; or something of that sort?

A I do not know the answer to that question. I do know the board of adjustments membership on that is not an easy role, because these people, whether black or white, come under an awful lot of pressure when you have a hundred people in the chambers and fifty-four something and fifty against it.

Q What has that got to do with my question?

A Well, it has a lot to do with the question. Getting somebody that wants to take that pressure and strain and listen to all of that static and any member of the press can tell you what goes on in a board of adjustment meeting.

Q Are you inferring that there have been black people unwilling to take that pressure?

A No. I didn't infer black or white. A lot of people wouldn't take that pressure.

Q You are not saying that there are not qualified black citizens in Mobile who were able to serve on the board of adjustments?

A No. We have one on there.

Q Is he the only qualified person?

A I did not say that. I have not implied that there were not qualified blacks.

Q What about this air conditioning board? This is the board that screens applicants for licenses for people who want to do air conditioning work?

A As I understand it, yes.

Q As a matter of fact, there is a lot of air conditioning mechanic type courses in the local trade schools, isn't there?

A So far as I know.

Q Southwest Technical State, Carver State, I think both have courses, don't they?

A I am not familiar with that.

Q You are not saying that there are no black persons in this community who are qualified to serve on that board, are you?

A No. But we have not received recommendations from these various agencies that make the recommendations.

Q The air conditioning contractors?

A When those recommendations come up to us, we don't know whether they are black or white. They recommend Mr. Jones, Mr. Smith or whoever.

Q And it is these private agencies that control on who serves on the board?

A They make their recommendations to the city commission and we appoint them.

Q You are powerless not to appoint their recommendations; is that correct?

A I think these requirements are specified in the ordinance of the state's statute and these people are rightfully making these recommendations to us.

MR. BLACKSHER:

I believe, your Honor, we could have this document marked, but the information was turned over to us from the City indicates that the air conditioning board is established by a city ordinance. Do you want to stipulate to that?

MR. ARENDALL:

Whatever it shows, Jim. I have really done no research on these things.

MR. BLACKSHER:

In fact, the air conditioning board ordinance says it shall be composed of five members appointed by the City

Commission. It shall consist of the following members; one air conditioning refrigeration mechanic, one business principal of a registered air conditioning and heating firm; one principal of a registered air conditioning and heating firm that is primarily engaged in installing heating and air conditioning systems and residences and one independent practicing mechanical engineer, a registered engineer in the State of Alabama, and one representative of the public.

So, it appears that no one makes recommendations to that board. Does that come as a surprise to you?

A No, it doesn't come as a surprise. We have forty-six different boards and commissions here and I think it would be impossible for me to be familiar with every ordinance and state statute. I can say emphatically that no black person has ever come to me and said, "Mr. Mims, we would like some representation on the air conditioning advisory board." I have had no complaints in the eleven years that I have been in office.

Q Have white persons come to you and requested representation on the air conditioning board?

A No.

Q Now, this Mobile Bicentennial committee. Is there any reason why there are three out of forty-six members that are black? Are there any qualifications that you felt ruled out

any black citizens in substantial numbers to that board?

A We appointed some blacks to this, ever how many to begin with, and then this committee kind of grew on us, because a number of people expressed interest in the bicentennial celebration and, as a civic club, well, they would say you ought to put Mr. Jones on here. He is, you know, involved with the ROTC, or whatever, and he ought to be on the bicentennial committee and the City Commission kept adding and adding and we wound up with whatever it says here, forty-six members, but go back and research the records at City Hall and you will find out that we started off with about twelve members, three of which were black, and it grew and grew and grew and that is the only explanation I can give you.

Q The explanation, as I understand it, being they just wanted black groups like white groups expressed interest in joining the committee, is that what you are saying?

A Well, yes, and also the blacks have not expressed as much interest, as I would like to have seen them express, in our Independence Day celebration. Every year out of thirty-five thousand at Ladd Stadium I doubt seriously if we had seven hundred blacks and it was a free program for all the citizens of Mobile and we have encouraged everyone to come and enjoy this program.

Q By the way, I attended the program and you say there were seven hundred black people in the audience?

A This would be my estimation.

Q I guess you were counting the people sitting in the end zone stands, mostly?

A No. I tried to look over it as I made a circle around the field and on the stage and I just did not see many black people present at that bicentennial or that Independence Day celebration.

Q In point of fact, I didn't see any black entertainers and I thought that was regretable.

THE COURT:

Well, you ask questions and don't get into an argument.

MR. BLACKSHER:

Were there any black people, entertainers, besides the black people in the marching band?

A No.

Q We have the item seven, which is the center city development authority which is, as my notes say, is suppose to rejuvenate or help rejuvenate the inner city out to the Loop; is that correct?

THE COURT:

Let's don't get into another subject here. We will

A Its basis of funding is from the member governments that participate and contribute on a per capita basis and they use that funding to match certain federal and/or state or special agency programs.

Q What agencies in Mobile County participate?

A I am not sure, but I think all of the municipalities in the County government are members.

Q Is the South Alabama Regional Planning Commission controlled by the Mobile City Commission?

A No, sir.

Q To what degree does the Mobile City Commission input have on any influence on its operation?

A Only as voting members. We are members of the executive committee and various aspects of the organization, but we vote -- their voting is on a per capita formula basis. So, that whatever our proportion of our population is to the three county area, that is what our voting is.

Q Now, Mr. Greenough, in your 1973 election, you were opposed by a Mr. Bailey, you were not?

A Yes, sir.

Q Were there any other candidates in that election?

A Yes. There were two others.

Q Who were they?

A Mr. Bridges, Earl Bridges, and Mr. Ollie Lee Taylor.

Q Mr. Ollie Lee Taylor was black?

A Yes, sir.

Q How did the first election come out?

A Mr. Bailey and I were in the runoff.

Q Who was ahead?

A I think Mr. Bailey was.

Q Did you make any efforts to get black support in the original election?

A I did from the outset of my campaign and all the way through the runoff.

Q Is it fair to say then that you were not concerned about being tagged with the black vote?

A I was looking for every vote I could get.

Q Bailey actually got some forty-eight point one percent of the vote in the original election, did he not?

A Yes, sir.

Q And you were the decided underdog at that stage?

A I think everybody had that opinion, yes.

Q Did you go back to the black community and seek their active support in the runoff?

A Yes, sir. I did.

Q Were you successful?

A I think the statistics would reveal that, yes.

Q Do you believe that the black vote or the vote of blacks

in the black areas constituted the swing vote in that election?

A That is awfully hard to answer. I presume, if you hold all other votes in isolation, the answer would be yes, but I think this is a rather static way to look at it. I think there is much more dynamics involved in the election process, but actually I would have to say that generally, probably, yes.

Q In any event, you did, in the runoff, secure a substantially larger percentage of votes in the black areas than you did in the initial race, did you not?

A To my recollection, yes.

Q Did you have any assistance from leaders of the black community in connection with that campaign?

A Fortunately, yes.

Well, I should say the younger element that has sometimes been described as the young turks, tended to be in support of my candidacy.

Q Could you identify some of these?

A Well, there are some well known names and there are many others not well known, probably, but one who is now a member of the Alabama House, Gary Cooper, was a very strong public supporter of mine. Milton Joiner, a young man with whom I had gone to the University of South Alabama, and many others.

and I think Mr. Mims has discussed the representation or lack of it of the City of Mobile on the supervisory commission. I have neglected or did neglect to ask him, but is there currently pending some effort to get that changed by legislation?

A Yes, sir. Representative Gary Cooper has introduced a bill which would accomplish several things. I am not intimately familiar with it, except the essence of it is to allow for a broadened base of representation on the board, itself, as well as the board selection procedures and, thus, I guess the supervisory committee.

I think that I would have to say, to my recollection, I did publicly and I think my two fellow commissioners both herald this as a positive step in the right direction, although I don't think any one of the three of us saw this as the ultimate cure and, again, I say I think representative Cooper realizes these sorts of things must be taken one step at a time.

Q Mr. Seales testified about the absence of a park in the Texas Street urban renewal area and that is under your jurisdiction.

Can you tell us briefly about that?

A Yes, sir. With the proper difference to our present company, the delay in that whole program is traceable to the

MORNING SESSION

July 20, 1976 9:00 o'clock, A.M.

THE COURT:

All right. Is Mr. Mims back?

MR. ARENDALL:

Yes, sir.

LAMBERT C. MIMS

the witness, resumed the stand and testified further, as follows:

THE COURT:

All right. Gentlemen, you may continue with the cross of Commissioner Mims.

CONTINUED CROSS EXAMINATION

BY MR. BLACKSHER:

Q Mr. Mims, I direct your attention to Plaintiff's Exhibit 64, again.

Do you have it in front of you?

A Yes.

Q And in particular, to committee number 7, center city development authority, and I understand that is some sort of authority that is designed to help rejuvenate the inner city out to the Loop.

Would you be more explicit about what that authority does?

A Well, this is a new authority that has been created in recent months and the idea is to preserve what would be called the older section of Mobile to make sure that it doesn't deteriorate and that it is restored and refurbished and rejuventated, so to speak.

Q You mean the older residential section or the older business section?

A Both.

Q The city has only one appointment to that committee or to that authority?

A No. This is in error as we brought out earlier. There are several persons on this authority, including the City Commissioners and if I am not mistaken the mayor, whoever serves as mayor at the time, is the chairman of this authority and it includes people who are connected with the downtown Mobile Unlimited program, as well as other businessmen and property owners in the area.

Q Businessmen and property owners. Are there any blacks on that authority and, if so, why not?

A There are no blacks.

Q I asked why not?

A I could not answer that.

Q They are appointed by the City Commission; is that correct?

THE COURT:

If I recall correctly, your testimony yesterday was five was the number including yourselves on that?

A I believe that's right, your Honor.

THE COURT:

Are there any other commissioners on that?

A If I am not mistaken the commissioner serving as mayor is on there.

Your Honor, I am not sure if the other two commissioners are on there or not.

THE COURT:

All right.

MR. ARENDALL:

If your Honor please, I have here a list of the members of that committee. Would you like that?

THE COURT:

Yes.

MR. ARENDALL:

This is dated March 25th -- no. The ordinance was dated March 25th, 1975. I am not sure as to the precise date of these, but members are all three commissioners, Mr. James Van Antwerp, Jr., vice chairman of the committee;

Mr. Ken L. Lott, who is an officer of the Merchants Bank; Mr. Don Henry, and I don't know what he is. Mr. H. J. Goubil, who is with Title Insurance Company.

THE COURT:

How do you spell that last name?

MR. ARENDALL:

G-o-u-b-i-l.

THE COURT:

Well, that gives seven, then, instead of five; three commissioners and four businessmen.

MR. ARENDALL:

Yes. I understand, Judge, from Mr. Greenough, he had something to do with the appointment of this and he can testify about it perhaps and knows more about it than Mr. Mims does.

THE COURT:

All right.

MR. BLACKSHER:

Mr. Mims, you are not suggesting, are you, that there are no black businessmen or property owners who are not interested in downtown Mobile?

A Absolutely not.

Q By the way, is there a similar authority or committee that has, as its purpose, the rejuvenation of the black

business districts of Mobile?

A This particular authority is interested in the entire area from the water front to Government Street Loop, without exception to race or color.

Q Yes, sir. I am speaking about the area from Broad Street out Davis Avenue, north of the Prichard City limits, which is where the black business district is, traditionally.

A There is no authority set up with the responsibility for that specific purpose, no.

Q Can you direct your attention to number nine, board of electrical examiners which there have been no blacks out of a total of seven members, over the years, and I believe you said that various contractors, the IBEW, Alabama Power Company nominate people for this board?

A It is my understanding that people who are associated with the electrical profession, for lack of a better word, are the ones who are appointed to this electrical examining board.

Q Once again, I want to make sure that the record is clear that the City is not bound by ordinance or otherwise to accept the recommendation of these private agencies, is it?

A I would not think so. However, we abide by the recommendations of these various groups.

Q Whoever they recommend, you as a formality, go ahead and approve?

A Normally that is the procedure.

Q You are not suggesting either, are you, that there are no black qualified electricians in the City of Mobile?

A No, sir. We have a very fine electrician working for the City. In fact, he is head of the electrical inspection department.

Q Item ten, citizens advisory group for the mass transit technical study, which shows that three of the eight members are black.

Isn't it true, Mr. Mims, that the federal government, in an attempt to meet the Title six requirements, expressly required the City to appoint the three blacks to that committee?

A I do not have knolwedge of that requirement.

MR. BLACKSHER:

Would you mark this, Mr. O'Connor.

(Plaintiff's Exhibit 103 received and marked, for identification.)

MR. BLACKSHER:

This 103 will be two documents. Actually, one is the list showing the members of this committee, citizens advisory group for mass transit technical study, and attached

to it is a letter to Mayor Greenough from the South Alabama Regional Planning Commission dated January 20, 1975.

THE COURT:

What is the number of that, please?

MR. BLACKSHER:

103. Look at the list that I referred to at the bottom of the first page and you will see where the South Alabama Regional Planning Commission, pursuant to Title 6 of the Civil Rights Act, is recommending that people be appointed. I believe there are two non-minority female, two minority female and the same for males, right?

A This is correct.

Q In point of fact there appear to be only three blacks as one of the other eight committee members, a minority person, other than a black to act for the four that the Federal government asked be appointed?

A Are you asking if they are a minority?

Q Yes, sir. I am asking if one of the remainding eight members other than the three blacks is a minority person?

A I imagine you could call Mr. Briskman a minority. He is a jew. Mr. Zoghby is a Syrian.

Q One of those would classify as a minority, in your opinion?

A I would think so.

Q Let's talk a little bit about the item eleven, the citizens advisory committee on the Donald Street freeway in which eleven of fifteen members are or were black.

Do I understand you to say it is defunct, now?

A I think perhaps it has already served its purpose to try to establish this corridor through this area of the city.

Q Why were there so many blacks on this particular committee, Mr. Mims?

A If my memory serves me correctly, one of the requirements by the federal highway administration and others was that there be people from the area that is being affected and, of course, this road was going out Congress and Donald Streets through Toulminville and my answer would be it went through this area where many of these people lived.

Q It is a predominantly black residential area?

A I would say so, yes.

THE COURT:

What number was that?

A Number eleven.

THE COURT:

Okay.

MR. BLACKSHER:

How did you locate the black people that served on that committee, Mr. Mims? How did the commissioners locate them?

A If I recall the particular meeting, we sat down and looked at the area that was being affected and tried to get some people who were interested or would be interested in where the road went.

Q Yes, sir. I understand that. My question is, how did you get the people?

A Well, sir, I look at a list of people and try to recall who lives in what ward and what area of town and make my appointments.

Q Did you have any difficulty in getting people to serve on this committee?

A According to Mr. Joiner, who was our liasion.....

Q Milton Joiner?

A Earl Joiner, public works engineer, served as liasion for the City Commission. According to Mr. Joiner sometimes they had very high attendance of people who attended the meetings.

Q No, sir. I asked about getting people to serve on the committee?

A I thought we were talking about serving. Persons don't come to the meeting they are not serving.

THE COURT:

The thrust of his question is in finding people to make the appointments?

A Your Honor, I don't recall that specific point.

MR. BLACKSHER:

All right, sir. I next direct your attention to number twelve. I think I have not moved the introduction of Exhibit 103 and I so move.

THE COURT:

Let it in.

(Plaintiff's Exhibit number 103 received and marked, in evidence)

MR. BLACKSHER:

Item number twelve, the codes advisory committee where there have been no blacks.

Why is that, Mr. Mims?

A I could not answer that.

Q Architects, structural engineer, mechanical engineer, electrical engineer, member of the building trades, a general contractor, home builders, real estate -- this is a body that passes on what building codes will be adopted and enforced by the City of Mobile; is that correct?

A This is correct.

THE COURT:

Does that include residences?

A All buildings, sir.

THE COURT:

All right.

MR. BLACKSHER:

In point of fact, Mr. Mims, not all or very few of the people on this list, and I have that list before me, a very few of them are actually recommended by an outside agency; isn't that correct, or do you knw?

A I do not have the list before me.

MR. BLACKSHER:

I think we will introduce this into evidence, your Honor. This is the list and the ordinance that creates this particular committee. Perhaps it will be useful to have all of these in the record.

(Plaintiff's Exhibit number 104 received and marked, in evidence.)

MR. BLACKSHER:

I will go on to the next one, your Honor.

I move the introduction of 104.

THE COURT:

It is admitted. Go ahead.

MR. BLACKSHER:

Item thirteen is the commission on progress.

As I understand it, that is a committee that you personally had some responsibility in forming?

A This commission was in existence when I assumed office in 1965. It was called a bi-racial committee. It was at my suggestion, after the racial strife of the sixties and we moved on to trying to make progress in other areas, that we changed the name to commission on progress, because the group was considering matters other than race related matters and matters that dealt with things other than race, but I have had close association with this committee or this commission over the years that I have been in office and this committee has done a good work for the people of Mobile.

Q There was a conscious effort to insure there were a repetitive number of black people on this committee, I take it?

A Yes. It was established as a bi-racial committee from the very beginning.

Q What was some of the other areas that this committee got into that caused you to change its name?

A Well, economic -- in the area of economics. In other words, trying to obtain jobs for people and see that every one could get a good job in Mobile. We have put forth every effort down through the years.

This committee has also discussed problems as they

related to police in public works and other functions of city government. So, at their meetings, many many different matters have been discussed, parks and playgrounds and public work matters and police matters and general governmental services, all of these things have been discussed by this committee.

Q It sounds like it was duplicating the function of a number of other bodies that we have been talking about?

A Well, I am sure there would be some overlapping in a number of areas.

Q The important thing is that it had a bi-racial composition, as I understand it, that was intended to create a sign of unity in the community on these issues?

A I think it did create unity and created much more unity than maybe it was given credit for having created.

Q You nevertheless thought the term bi-racial committee was not an adviseable thing to have during the last part of the sixties?

A During the late sixties it was known as a bi-racial committee and then, at some point in time and I could not tell you when the name was changed, but it was, at my recommendation, and I made a newsrelease on it and it is all a matter of record. We did recommend to change the name because it was dealing with matters other than purely race

related matters.

Q Have you had any trouble finding black people to serve on this committee, Mr. Mims?

A We, as far as I know, have been able to get people to serve, not every one has one hundred percent-attendance. It is spasmodic, as far as attendance is concerned, on both the black side and the white side.

Q Okay. I next direct your attention to item fourteen, the educational building authority.

As I understand it, this was some sort of authority established to enable city bonds to be sold to finance capital improvements on some educational facilities; is that correct?

A So far as I know. You will have to refresh my memory with some of these authorities, if you don't mind.

Q You don't happen to know which educational facilities received the benefit of these bonds, do you?

A On this particular authority I could not tell you, to save my soul.

Q It wasn't the Mobile County Board of school commissioners, the public school system, was it?

A I do not know.

Q Could it have been some private schools?

A I just said I do not know, counsel.

Q Who would know, Mr. Mims?

A Well, I assume that Mr. Arendall has the file with the functions of these various authorities. I am sorry, your Honor, I didn't bring all of this up here with me and I hope the Court will understand that I can't remember all of this.

As we indicated yesterday, we set these authorities up and they serve as a vehicle for financing and we have very little to do with it once the group comes to us and asks us to form this committee or this authority. They go on with the function and provide the buildings for public use. So, I really -- I have been too concerned with drainage....

MR. ARENDALL:

If your Honor please, we have furnished to the plaintiffs a list of the membership of each of these various commissions and boards and indications of by whom they were appointed or recommended and the copy of the ordinance under which they serve. I see, as to this particular one -- and I don't know this adds anything or will trigger anything in Mr. Mims's mind, but this says it was the application of Messrs. C. T. Cartee and Guy W. Reynolds and so forth.

A I remember a Dr. Thomas, a lady, if I am not mistaken.

THE COURT:

Does that trigger what they came to you for in the purpose of the authority?

A They came to be able to raise funds to promote an educational facility.

THE COURT:

Was it a private school?

MR. ARENDALL:

Was it a private school?

A I know Dr. Thomas is associated with a private school. So help me, I do not know what the ordinance says.

MR. ARENDALL:

It doesn't identify the school location or anything. What is the name of the private school that Dr. Thomas is associated with, Mr. Mims?

A It is my understanding that the school is located on Government Street.

THE COURT:

Do you know the name of it?

A No, sir.

MR. ARENDALL:

Whereabouts on Government Street?

A The school is located across from Constantines Restaurant.

MR. BLACKSHER:

Gulf Coast Academy?

A That is correct. I spoke at their graduation exercise not long ago and I could not remember the name.

MR. BLACKSHER:

That academy has an all white enrollment, does it not?

A I could not testify to that fact.

Q Did you see any blacks in attendance when you spoke there?

A I don't recall any blacks being at the graduation exercise.

Q Okay. The next one is item fifteen, Mobile area public higher education foundation,

This has to do with the University of South Alabama, doesn't it?

A I do not have the record in front of me.

Q Mr. Cleverdon is on the committee, Mr. Herron, Mr. Little and Mr. Crowe.

A That sounds like the University of South Alabama program.

MR. ARENDALL:

And Mr. Langan.

MR. BLACKSHER:

Right. Mr. Langan, Mr. Smith and others. I won't

read this into the record.

Is there any particular reason why there were no blacks, to your knowledge, appointed to this particular committee?

A No. I do not know that. I think perhaps that was set up before my time at City Hall.

Q Well, yes. It was set up, apparently, in June of 1962. The appointments ranged though from -- well, except for one year in 1962, they ranged from 1970 up to 1976.

A Well, normally.....

MR. ARENDALL:

May I call your attention that according to this apparently the only appointment has come up on this board since Mr. Mims came up on the commission was Mr. Joe Langan's original appointment must have expired and he was re-appointed on September 30, 1974, and that is the only appointment the City Commission has had since that time.

THE COURT:

The city has one appointment to that board?

MR. BLACKSHER:

I will put this in evidence. It indicates to me the original appointments were 10/1/70 and others in '70, '72 and one in '74.

MR. ARENDALL:

I beg your pardon. I see they were originally appointed in 1970. I apologize to you. I misread it.

THE COURT:

Who are the other appointing authorities?

MR. BLACKSHER:

Do you know, Mr. Mims?

A I am sorry. It does say on the list.

MR. BLACKSHER:

There are some county appointments.

THE COURT:

How many?

MR. BLACKSHER:

Five.

THE COURT:

County appointments?

MR. BLACKSHER:

Yes, sir. And there are some school board appointments numbering six.

THE COURT:

That is the county school board?

MR. BLACKSHER:

That's all we have.

MR. ARENDALL:

Jim, it could be that the Cleverdon was also a county

appointment. Apparently, the city has six and the school board has six -- that is, the county has six.

THE COURT:

So there are ten members rather than six members of that board.

MR. BLACKSHER:

More than that, your Honor.

MR. ARENDALL:

It would be at least six and six is twelve and six more would be eighteen.

THE COURT:

Okay.

MR. ARENDALL:

Assuming that Mr. Cleverdon was appointed by somebody and he is on it.

MR. BLACKSHER:

We offer this.

(Plaintiff's Exhibit number 105 received and marked, in evidence.)

MR. BLACKSHER:

Next I will direct your attention to number sixteen, fine arts museum of the south at Mobile, which indicates there have been two blacks out of a total of forty-one members over the years.

Do you know why there have not been any more blacks than that on this commission?

A As we indicated previously, normally people who are interested in arts are appointed to this board, people who make contributions and go out in the community and try to raise funds that would help operate it and make capital improvements. People who express a great deal of interest in the arts have been appointed and recommendations have come from the various groups.

Q There are a substantial number of blacks in this community who are interested in the arts, aren't there?

A I am sure there must be.

Q Fort Conde plaza development authority, number seventeen. There have been no blacks on that committee.

I believe your testimony was that it consisted of three City Commissioners and property owners from that area; is that correct?

A That is correct.

Q Are there no black property owners in the Fort Conde area?

A I have no knowledge of any blacks owning land in that area.

Q There are some black residents of that area, aren't there?

A Absolutely not. No residents at all in that area, at this point.

THE COURT:

He means the immediate adjoining area.

A Well, your Honor, this authority has to do with the property located within the interchange.

THE COURT:

Well, limit ours to that area.

A Well, that was what I was talking about. No, sir. Not that I know of.

MR. BLACKSHER:

Eighteen is the Mobile Historical Development Commission of which there have been a total of one hundred and thirteen members over the years. None of whom are black.

Can you explain that, Mr. Mims?

A Only that we indicated yesterday that we received recommendations from the various agencies that concerned themselves with historic preservation and development and we accept these recommendations as they come to us. Normally they will give us, number one and number two, and we normally select the number one recommendation on the list.

Q Well, this would certainly indicate that there aren't any blacks who are interested in the historical development of Mobile. You don't think that is true, do you?

A All I can do is speak from experience. I haven't heard from too many who were interested in it.

Q I am reading now, Mr. Mims, from Exhibit 76, Plaintiff's Exhibit 76, which is this neighborhoods of Mobile published by the South Alabama Regional -- City Planning Commission, excuse me, page three. Says the essential -- the topic of this paragraph, "People, values and a swelling tone".

"The essential population characteristics and broadly basic values of today existed at this latter time. Migrants from the eastern seaboard, scotch, irish, and english, were settling as farmers in northern Alabama and were the first to use the Tombigbee and Alabama rivers for transportation. Many had settled in Mobile; their uneducated, rough and tumble ways were in strong contrast to the educated, conservative and orthodox habits of the former New England traders and merchants living here. Yet, eventually there was merger of divergence. The few remaining french and spanish families contributed latin values to those of the two major groups. Although approximately one-third of the population at this time was indian or negro, these two minorities had little direct effect on the value structure found in the city."

So, according to this report of Mobile Planning Commission, negroes have had little to do with the historic development?

A They have had little to do with it.

Q Would you agree with the statement?

THE COURT:

I believe the statement is little effect.

MR. BLACKSHER:

I think you are right, your Honor.

THE COURT:

I just listened to what you said.

MR. BLACKSHER:

It says they have had little effect on the value structure found in the city. Would you agree with that?

A Well, that is a document of the City of Mobile and I support the document.

Q Okay. I next direct your attention to number nineteen, the Independence Day celebration committee.

Is that the committee that plans the fair at Ladd Stadium on the 4th of July?

A This is correct.

Q I see it has only one black person out of fourteen members. Can you explain that?

A Well, I can't explain the ratio, one to fourteen, but I can say that all fourteen of these are not active.

Q I didn't understand your answer.

A I said I could not explain the ratio of one to

fourteen. However, I could say that all fourteen have not been active. The black member has been active. If I am not mistaken it is Mr. Leroy Davis, a very fine businessman.

Q And he was appointed by you, in fact?

A I think that's right.

Q I think I will introduce this list of members into evidence. For the record it shows who appointed them and when.

(Plaintiff's Exhibit number 106 received and marked, in evidence)

MR. BLACKSHER:

Mr. Doyle and Mr. Greenough have not appointed any black members to that commission.

Do you suppose that might have anything to do with why you saw a smaller turn out than you expected of black people at that event?

A No. I don't think that has anything to do with it. I don't think the membership on the committee has a thing in the world to do with the number of people who turned out.

Q Could we talk about the event that we all witnessed here recently just a second? Now, it started out with a marching band and then there were some floats that came out. Among those floats were there any blacks riding those floats?

A I think there was a black lady on one of the floats who gave the pledge to the flag.

Q You are absolutely correct. She was the only black person on the platform, as I recall.

A Well, that might be true, but I call your attention to the previous years when we had black ministers on the platform and on a number of occasions have had black people on the platform. This year, maybe one was on the platform, but that has not been the case every year. I know the first year we had it we had the bishop, I think it was a black man from New Orleans, came here and gave the invocation and other blacks have been on it, too. I think Bishop Smith has been on it and other blacks in years passed. I am sure the committee, when they were .....

Q Well, what happened this year? There was a conspicuous absence of blacks on that field this year and I wondered what happened.

A Well, I am not a member of that planning committee. Mr. Locket is chairman of that committee and they have worked extremely hard to put on a good show for all of the people of Mobile every year and we run ads in the Beacon and run ads in the Mobile Press Register and we encourage people and I have been on the radio time and time again on all stations encouraging people to come to the Independence Day celebration. We can't make people come to the stadium to celebrate the birthday of our nation. I can't answer that

question.

Q The two principle entertainers were Mr. Jerry Clower, a very fine comedian. I think you would have to admit that his style of humour was not ethnicly aligned with the black culture, would you?

A I didn't look at it that way. Mr. Clower is a fine christian man and I know he doesn't have any animosity or ill feelings toward any race or nationality. I think that to be a fact.

Q In point of fact, he made one joke of how he was tired of shiftless people who weren't working or something to that effect.

A Well, of course, if the shoe fits you have to wear it.

Q And the second major entertainer was the Nashville Brass.

A A very fine group of entertainers, yes.

Q Who played a number of excellent songs, including one rousing rendition of Dixie, as I recall.

A Well, that is correct and I was amazed that a black major standing right in front of me stood up.

Q Along with everybody else, at that point?

A Well, if you were watching me, I was reluctant to stand, but I am an American and I believe in our country and, to be frank with you, I am a little reluctant to stand to

anything other than to Amazing Grace and the Star Spangled Banner.

Q I appreciate that, Mr. Mims. Let's move on to the next one. The industrial development board is number twenty and there have been no blacks out of a total of fifteen members. The industrial development board, the ordinance does not tell us what use is going to be made of the monies, the capital monies, that will be raised through these municipal bonds. I take it that is what it was for, wasn't it?

A The industrial development board is a vehicle whereby industries can obtain funds to expand or develop new industries that create jobs and, over the years, many hundreds and even thousands of jobs have been created because of this board's involvement and because it can be used to obtain the funds for industrial development and, of course, we have blacks and whites in all segments of the community working at these industries that have been provided because of this industrial development board.

Q According to the list here, every one of the members has been recommended by the Mobile Chamber of Commerce?

A I am sure this is correct.

Q And to get back to my last question, which really wasn't answered. Can you tell me some of the plants, factories or businesses that have benefited from these bonds?

A Well, a number of them. I think both of the paper mills have benefited from these bonds, the new paint company going in down at the Theodore Industrial Complex. I don't have the list, but a number of firms have benefited and the community has benefited.

Q Smith's Bakery?

A It is my understanding that Smith's Bakery used industrial development bonds, yes.

Q And Coca-Cola Company, Delchamps?

A Well, there are a number of them and all of them mean an awfully lot to this community. They have big payrolls.

MR. BLACKSHER:

We offer this.

(Plaintiff's Exhibit number 107 received and marked, in evidence)

MR. BLACKSHER:

Wouldn't you think there were a number of black businessmen that would be interested in serving on that particular board?

A I do not know.

Q Do you have any boards or committees for the City of Mobile that provide development bonds for minority enterprises?

A Well, anyone has an opportunity to come before this board and seek funds or seek a bond program that would generate

funds without regard to race. So, I would suggest that minority groups or anyone else who would be interested would come before this board.

Q Do you know whether or not any minority groups have, in fact, used it?

A I do not know.

Q I am going to skip over a number of these and try to make these move along a little faster, Mr. Mims, unless there is something you would like to say about any of them.

You said, at this point in your direct testimony, that the City Commission has little to do with these boards after the members are appointed; is that correct?

A These boards that are set up on these authorities that are set up for strictly financing, we have very little to do with it. Now, I am not saying that we have very little to do with all of these boards, because you skipped over one of the most important ones.

Q The Housing Board?

A That's right. A very important board and we do make appointments to this board and we do have close relationships with this board.

W finance a lot of projects. The city of Mobile has expended millions upon millions of dollars of urban renewal funds that have cleaned out slums and provided better housing

for our people.

Q You will admit that the majority of the clientale for the public housing board are black?

A This is correct.

Q And concerning the public housing projects that have been built by the City of Mobile it is also a fact that they have also been located in black neighborhoods; isn't that correct?

A Well, they are located in predominantly the older sections of the city, because this is .....

THE COURT:

Well, are they predominantly black?

A Your Honor.....

THE COURT:

I am speaking of where the work was taking place.

A Well, yes. I would say so.

THE COURT:

All right.

MR. BLACKSHER:

Back to my point about the involvement of the City Commissioners once these boards are appointed.

Was it my understanding that they pretty much functioned on their own once they are set up?

A Well, this is true and, as I testified earlier, I

appoint people to these committees and boards that I have confidence in and I don't pull strings. They are not puppets on the string for Lambert Mims when I appoint them.

We depend upon these people to run these operations. Now, that doesn't mean we don't have close communication or close association with these people. We have one of our own City Commissioners serving on the water and sewer board.

Well, certainly we discussed water and sewer board problems and we have these people serving on the housing board and we discuss problems as they relate to the community.

THE COURT:

Now, it seems most of these boards are -- many of them rather are established for a specific purpose and, after that purpose is accomplished, some of them become dormant. I am not sure about the Mobile Housing Board. Are these members salaried members who function day to day or is this an advisory board that just advises the Mobile Housing Board?

A Your Honor, the Mobile Housing Board is more than an advisory board. It is an operating board.

THE COURT:

First, is it a full time job?

A No. These businessmen are appointed.

THE COURT:

These are advisory people to whom?

A No, sir. These men serve as a board and they give instructions to the director, the executive director, who is a full time man and he has a staff.

THE COURT:

That is what I wanted to know.

A But this is a very responsible group of people and they handle millions of not only local, but federal monies.

THE COURT:

About how often does the board meet?

A I think it meets twice monthly, your Honor, and then on call as needed.

THE COURT:

Some function -- I realize the comparison is not exact, but something like a board of directors of a business institution?

A This is correct. If I might add, we have more contact with the executive director than we do actually with the members of the board, because the members of the board set the policies and the executive director then has to carry them out and he communicates quite frequently with all three commissioners and with the board of commissioners.

MR. BLACKSHER:

That is Mr. Jimmy Alexander?

A That is correct.

Q Who, for the record, is white?

A White color or named white?

Q Race.

A Well, Mr. Gray is a black man on the board. The white man.....

THE COURT:

Well, all right. We are going through them and I would like to know something of their -- not a lot, but is he a business man or social worker or government employee, or what?

A All right. Let me take them one at a time, your Honor. Mr. Gray is a black man on the board and he is with the Mobile County Public School system and, if I am not mistaken, he is an assistant principal at Shaw High School.

THE COURT:

All right.

A Mr. Norman Cox is the president of the Patterson Company.

THE COURT:

Is that a lumber company?

A No, sir. Wholesale supplies of some kind, flooring and things such as this.

THE COURT:

All right.

A And then Mr. David Frielander who is president of Mobile Rug and Shade Company.

THE COURT:

All right.

A Then there is Mr. Howard Adair who is the supervisor or superintendent with the South Central Bell Telephone Company.

THE COURT:

All right.

A And then there is a Mr. Gary Ellis who is the owner of a drugstore and he is a pharmacist.

THE COURT:

All right.

MR. BLACKSHER:

Your Honor, I am introducing, as 108, the list that Mr. Mims has just gone through.

THE COURT:

All right.

(Plaintiff's Exhibit 108 was received and marked, in evidence)

MR. BLACKSHER:

By the way, Mr. Mims, Mobile Rug and Shade is owned by either you or your brother; is that correct?

A Absolutely not. I wish it were.

Q You are not connected with it?

A Absolutely not. Mr. Friedlander is the owner of Mobile Rug and Shade Company.

Q All right. In any event, what is your explanation for why there aren't more blacks on this board that affects the lives of so many black citizens of this community?

A I think the black community is represented and it has been represented by Mr. LeFlore, who served on this board and served ably, and as far as I am concerned, the blacks have representation with the white members.

Q So you think they are adquately represented now?

A Yes, because I know that these men that I have appointed to this board are just as interested in the blacks as they are the whites.

Q Now, sir, we will go to item thirty, which is the Mobile Library board which has had two black members out of a total of twenty over the years.

You wouldn't suggest, would you, that black citizens of Mobile are not interested in the public library?

A Not at all.

Q Can you explain why there have been so few blacks appointed to this board?

A Not really. This board is more or less an advisory

board to the commission and in charge of the libraries and the board of commissioners. The personnel who works for the library board is under civil service and I could not tell you why there is a two to fourteen ratio.

We, again, try to appoint people who are interested in this particular phase of our community activity and people who are willing to devote time to it. So, perhaps not too many blacks have shown an interest in it or have come forth and said we would like to have a part in the operation of the library system.

Q Now, I take it that you haven't gone out and actively sought black participation on this board then?

A No. I haven't personally, no.

Q Similarly the next one, item thirty-one, the greater Mobile Mental Health Retardation Board indicates that there are no black members.

You would not suggest, would you, that blacks aren't interested in mental health and retardation in Mobile?

A No, I wouldn't. I wouldn't suggest that at all.

Q Do you have any explanation for why there haven't been any blacks appointed to this board?

A As I indicated yesterday, if I am not mistaken, this is a fairly new board and these members -- and I do not have the list before me, but these people are vitally interested

and have expressed great concern for mental health and retarded children and retarded people. There are some people who are more interested than others and I have found people who have members or people of their family affected in these areas are more apt to press for these needs than others.

Q Well, once again, I will ask you if there have not been some black citizens of this community who have expressed interest in the mental health problems of the community?

A I can't recall any blacks being in any meetings with reference to mental health problems. Now, there may have been. I am not saying there haven't been, but to the best of my recollection, as citizens and we have had a number of groups who have come to City Hall with reference to the mental health program, interested citizens, and to the best of my recollection there have been no blacks among those who come seeking funds or support for mental health.

Q Are you familiar with, Mr. Mims, with the Searcy Hospital Human Rights Committee that was appointed by the Federal Court in Montgomery?

A Just what I have read in the media is all I know about it.

Q You are aware that there are black members on that committee, aren't you?

A I am not aware of the make-up of that committee.

Q I think you said, concerning number thirty-three, the Mobile Planning Commission, that it also is one of the most important commissions of city government; is that correct?

A I would say so, because it has to do with planning and zoning.

Q Do you have any explanation for why there have been no more than two of fifteen blacks on that planning commission?

A No. I know the gentleman who is on there now and the one who was on there prior to this gentleman being on, but I could not tell you why the ratio is one to seven.

Again, this is one of those things where you really are on the hot seat and you have to spend long hours listening to both sides with their arguments and presentations, and it is not easy to get people who will take this pressure, free of charge, to be quite frank with you.

Q Are you suggesting that the presence of one member, one black member on this commission, is an adequate representation of black citizens of this community?

A Well, I would think all seven of these members represent the community adequately, regardless of a person's color, when he comes before the commission for a zoning matter. I think they are represented adequately.

Q Well, let's talk about zoning for a moment.

Can't you agree with me that the white members of the

committee are going to be less familiar with the black residential and business areas of a city?

A No. I cannot agree with that because simply the chairman of this commission, at this time, every week before these matters come before the commission gets with the member of the planning staff at his own expense and on his own time and he visits every one of these sites that is coming before that planning commission the next day or the next week. He goes out into the communitites on hiw own at his own expense and familiarizes himself with these matters that are coming before that commission.

Q Mr. Mims, I said my point was that one can go out and inspect the various sites that are the subject of the attention of the planning commission, but unless one lives in the area one is not going to know what the sentiments of the residents or the people of the community are about how that land is being used; would you agree with that?

A No. I would not agree with that.

Q Well, you have appointed Mr. John L. Blacksher to that commission, have you not, the planning commission?

A Yes.

Q And is that the same Mr. John L. Blacksher about whom we heard complaints earlier that owned a lumber company in the Maysville area that was causing a nuisance?

A Yes.

Q Do you think Mr. Blacksher is familiar with the feelings and sentiments in that area about the way it is zoned and planned?

A I think Mr. Blacksher is, because Mr. Blacksher has met with the citizens of that area when they had a complaint about his company. He went and met with them at one of the local churches right next to his place of business and, as far as I know, Mr. Blacksher, with the exception of the lady who testified here the other day, has good raport with his neighborhood.

Q Does Mr. Blacksher live in that same neighborhood?

A No. Mr. Blacksher doesn't live there.

Q His address here is Tuthill Lane. Is that in Springhill, the western end of town?

A Yes.

Q Item thirty-four is the policeman, fire fighters pension and relief fund board and has had seven members over the years -- excuse me, has had ten members over the years, seven at present, none of whom has been black.

Now, I agree that there are relatively few, but there are some black policemen and fire fighters; is that correct?

A I think the record will prove that we have black policemen and fire fighters; yes, sir.

Q Is there any reason why none has been appointed to this particular pension and relief fund board?

A Well, I think it was brought out yesterday that most of these members of this particular board are people who are familiar with banking and people who are familiar about financial matters and the whole idea is to try to get as much interest as you can from the money that you have available in the fund so that it will be able to pay the pensions of both black and white people when they retire.

Q My notes indicate, on direct, that you said or Mr. Arendall said that three bankers, one business man, one investment businessman, the fire chief and the police chief?

A I think that is correct.

Q You are not suggesting that there aren't any black business men or bankers?

A Well, I have appointed a black banker or a savings and loans man, a Mr. Davis, to various committees and have used him as an advisor on a number of occasions. I have a high respect for Mr. Davis who is a savings and loan man, but Mr. Davis happens not to be on this particular board.

Q You say Mr. Davis is the only black banker or business man that you know?

A I didn't say that.

Q There are plenty of others?

A I don't know that many black bankers, no, but I know a lot of black businessmen, certainly.

Q You are not suggesting or you wouldn't suggest, would you, that blacks aren't interested in where trees are cut in Mobile?

A Well, let me say this, I don't know of any blacks who have expressed a great deal of opinion about trees. I don't know of any who have expressed a desire to serve on the tree commission.

As far as I am concerned, people have to have a desire to serve. The only reason I am sitting here today as mayor of Mobile and public works commissioner is because I had a sincere desire to serve the people. If I hadn't have had that desire I wouldn't have offered myself to run and I wouldn't have run three times. So, people have to have a desire regardless of their color.

Q Are you inferring that black people in this community just haven't had the desire, get up and go that you have demonstrated?

A I am saying that I do not believe that the black people have expressed the interest in the community that they should have. I will say that emphatically.

Q Item thirty-six is your neighborhood improvement council. It goes around various neighborhoods holding meetings,

encouraging paint up, fix up, clean up.

THE COURT:

What number is that? Mine is stapled together here.

A Thirty-six, your Honor.

THE COURT:

All right.

MR. BLACKSHER:

For example, problems with street lights, chairman of the committee, when he hears a complaint, will write you a memo personally that you can take action on. There have only been six of forty-nine blacks on that council.

Surely black citizens in this community, I think from the testimony, are interested in their neighborhoods. Do you have any explanation for why there are no more blacks than that represented?

A I could not answer that specifically, but it would be interesting to know if some of these blacks who have testified in this Court have been to these neighborhood improvement council meetings and have expressed themselves there. They certainly haven't expressed themselves to me as public works commissioner. In fact, I have met people here in this Court that I have never seen before.

Q Well, let's see, what was this other group, community service meetings that you mentioned along this point, in your

direct testimony, what is the relationship to the neighborhood improvement council?

A Well, the community service meetings that I initiated a number of years ago were primarily for .....

Q No. What is its relationship to the neighborhood improvement council?

A There is no relationship with the exception we are all trying to meet the needs of the community.

Q So you don't go into the neighborhood meetings through the neighborhood improvement council, but you have gone in through these community service meetings?

A This is correct. I have attended neighborhood improvement council meetings in the past, but I don't make it a practice to attend every neighborhood improvement council meeting.

Q You say you have tried to go into all of the communities through these community service meetings?

A Yes.

Q And it is the only way you know of of finding out the needs of the communities?

A Well, let me say this, many of the needs have been brought to the City government's attention, because we have gone into the communities and many of the needs have been met because they were called to our attention at a community service

meeting in a given neighborhood and so, I say without any hesitation, that the community service meetings have been very beneficial to the people of Mobile and they have allowed the establishment of a relationship or rapport between the people and the city government that was sorely needed here.

Q You testified that you have been to meetings in black areas , too?

A Oh, absolutely.

Q Is that what you said in your book, Mr. Mims?

A Well, I think you are referring to some meetings that were held during the heighth of racial trouble here in our city and I happened to have a copy of the book right here and I can quote you page and chapter where Mr. Outlaw and Mr. Langan, who was revered by the blacks and I went to the Davis Avenue community ceater and we had ministers and preachers and priests and black leaders from all over the place who booed us and called us all kinds of names and called Mr. Langan, who was supposed to be the great hero for black people, they called him just as many names as they did me and so, in that kind of a situation, at that particular time, we did not go back into any communities during those months when Beasley was marching in the streets and Rap Brown and Stokley Carmichael were making so much noise over the country and we had fire bombings and there were times when I had to have my house

guarded at night because of threats.

We did not go back after we were treated so rudely. Nobody but a crazy person would go back after they treated us like they did. I will be frank with you about that.

Q Well, there were a lot of people that stayed right there, the people that reside on Davis Avenue, right?

A Sir, I don't know.

THE COURT:

I think we are beating a dead horse here. There were black people undoubtedly who stayed and it was a time of racial strife is his point.

MR. BLACKSHER:

You were going to quote page and verse?

A Well, I had heard you were going to call me a racist, because of my book.

THE COURT:

Let's don't get into an argument.

MR. BLACKSHER:

You heard what?

THE COURT:

Let's don't get into an argument. If you want to refer to some page, go ahead.

A Your Honor, I was going to refer to the incident where we went to Davis Avenue and were treated rudely and it is in

my book.

THE COURT:

Did you want him to.....

MR. BLACKSHER:

The name of the book is "For Christ and Country", by Lambert C. Mims and published in 1969; is that right?

A Yes.

Q On page sixty-one -- well, it starts on page sixty and you talk about going into the various communities and one of the first communities we visited we found a disturbing situation. In addition to the people of the neighborhood who came to the meeting there was a large number of outsiders.....

THE COURT:

Mr. Blacksher, I really don't see any reason to that. It is like asking a black person to go to some extremist white meeting at a time of strife. I don't think that will particularly help us.

MR. BLACKSHER:

The book doesn't indicate they are extremists. Let me read from his book.

THE COURT:

The question is, you may offer testimony on what he says was his ensuing conduct and whether it was safe to go back or not. We all know there was a time back in the sixties

of extreme strife in this country and thank goodness it is not expressing itself in those over actions now.

And I think we are getting off into something that is encouraging arguments, so forth and so on.

MR. BLACKSHER:

Well, for whatever impeachment value, I will introduce a copy of this.

THE COURT:

Go ahead, Mr. Blacksher. You may do as you wish.

MR. BLACKSHER:

"Some were from other parts of the City and some were from far away. Most of these were militant blacks, but many were clergymen, protestant ministers, catholic priests and nuns. For nearly three hours these people accused and tried to intimidate their City fathers. Never in my life have I seen such abuse of public officials. We discontinued the neighborhood meetings.

Recently I was asked, during a television news conference, whether we were going to resume these meetings. I made the statement that I do not intend to go back to a meeting like that, again. To be abused and harrassed by militant irresponsibles whose aim, as far as some of us could determine, is simply to disrupt the whole City. I do not believe that the people who elected us to the City Commission

would endure this kind of thing and neither will we."

And by the people that elected you, Mr. Mims, I take it you were talking about the people in the suburbs?

A Well, I am talking about the City electorate, as a whole. I don't think any sane person, as I said a moment ago would go back and willingly present himself for this kind of persecution and this kind of ridicule.

These paragraphs you have read, or this paragraph you are lifting out of this book that has many, many paragraphs that are all together different from this that talks about the harmony that we have and all the good we are doing in the community. You are lifting from this book, for Christ and Country, which has a lot of good things in it. You are lifting this out of context. This did not mean .....

THE COURT:

I hate to keep pursuing it. I want to make a record.

We recognized that Lyndon Johnson had to limit his visitations during those periods of strife and, for a period of time, according to the news reports, his main appearances were at military bases and so forth. Let's get on to something more productive, gentlemen.

Q Well, let's talk about plumbers, Mr. Mims. Item thirty-seven, Plumber's Examining Board. No blacks have ever

been appointed to that board.

Can you explain why?

A According to the, as I understand it, ordinance, the people on this board would be people who know something about plumbing. For instance, I would not be very good on this board because I don't know much about plumbing.

So, as I understand it, these people on this board examine applicants for plumbers' licenses and so we have appointed, in accordance with the ordinance. I do not personally know of a black master plumber in the City of Mobile. Now, there may be some. I do now know personally a black master plumber, for instance.

Q What about the recreation advisory board, item thirty-eight. There is one black person out of twenty-two?

A Hasn't that board already served its time and isn't it now non-existent?

Q My notes indicate that it was proposed by Mr. Bailey. They were not reappointed in 1974 and that Mr. Bailey recommended all the names and you want Mr. Bailey to take all of the responsibility for it; is that it?

A Well, sir, I don't recall having made one appointment to this board, personally. I concurred with Mr. Bailey's recommendations at the time, I am sure, but I don't recall personally making one of these appointments and I couldn't

tell you, to save my life, who was on it.

Q Well, you certainly will agree, wouldn't you, that there are many more blacks than indicated by this representation that are indicated in recreation in the City?

A I certainly do. The black people certainly utilize the recreational facilities as much as anyone else in the community, but this is something Mr. Bailey brought up. What reason he wanted it for, I really do not know, and I could not recall. I am sure I concurred in it. I don't know whether the records shows I voted for it or not. It takes two to make a majority on a three man team.

Q South Alabama Regional Planning Commission, item number thirty-nine. This commission has the same members, the same terms as the Mobile Planning Commission; is that correct?

A This is right.

Q The Board of Water and Sewer Commissioners, item forty. One black out of twelve over the years.

Can you explain why there haven't been any more blacks on that board, Mr. Mims?

A Well, I think the blacks and the whites have sufficient representation. As I said yesterday I have made one appointment to that board, Mr. Moore, and somehow it was worked around where he was the only one I can lay claim to,

because of deaths and because of vacancies and other commissioners would feel that this was their appointment and they have, therefore, replaced these people as they vacated the position and I can claim only Mr. Moore, who served as chairman, and I think does a fantastic job as chairman.

MR. ARENDALL:

Mr. Blacksher I will call your attention that you remember that Bishop Phillips was formerly a member of that board.

MR. BLACKSHER:

Two blacks out of twelve.

MR. ARENDALL:

Yes.

THE COURT:

So that should be one over in the prior black members column?

MR. BLACKSHER:

All right. Mr. Mims, skip down to item forty-six, educational board. I understand your direct testimony to say that this was a board furthering the employees' education. I presume you mean the employees of the City of Mobile?

A As I understand this board, there are so many boards here that this could be some other board to get funds for someone. I do not know, but as I understand it, this is

the board whereby City employees are screened, those who want to further their education, and who are seeking City funds for their tuition.

Q And this board is made up of department heads of the City of Mobile?

A As I understand it. I do not have that list before me.

Q And one member elected at large?

A If that is what the ordinance says.

Q Or appointed from among the citizenary, I should say?

A Yes.

Q I guess that explains why there is no blacks on that board since there are no black department heads?

A You said it. Is that a question?

THE COURT:

Mr. Blacksher, let me see if I can get the thrust of your questioning. Let's see what your contentions are.

Is it your contention that there should be a pro-rata membership on the boards of whites and blacks or what is your contention?

MR. BLACKSHER:

Your Honor, our contention is that responsiveness in the contexts of the voting rights cases has to do with the

access of particular segments of the community to participation in the government.

THE COURT:

I asked you a question. Do you contend that must be on a quota basis?

MR. BLACKSHER:

Absolutely not. I do not contend, over a large number of boards or a large -- there has to be weight given to the fact that blacks are present.

THE COURT:

Let me make this observation. I cannot address myself, in the opinion, too many details. On such things as air conditioning boards, architectural review boards, electrical examiners, plumbing examining boards -- and I note that counsel for Plaintiffs are all whites. In Title 7 cases, and I think I should take somewhat judicial knowledge of evidence that has come to the Court on these matters that statistics have been offered to show that in skilled places, and we know somewhat, for instance about lawyers, that there is a market lack of blacks who are attorneys and a marked lack of blacks who are in skilled positions.

Now, that may address itself to the whole structure of how it came about, but I don't think it addresses itself to people placed on a certain number of these boards. I only

speak with reference to those, though, that call for some special talent in placing people on boards. I think we have to be cognizant of where there are special talents that there must be some pool from which they can reasonably be drawn. I will give you an opportunity to say anything about those remarks that you desire.

MR. BLACKSHER:

All I would say, your Honor, is that in every case there has been no evidence that there are not blacks nevertheless available for these occupations. The point of fact is most of these boards where some special skill is required, the City Commission adopts the recommendations made by private industry.

THE COURT:

Wouldn't the same thing apply to you? There are some skilled black lawyers. Why aren't they here at your table?

MR. BLACKSHER:

I don't know how to answer that.

THE COURT:

They very seldom appear in these cases. You are the lead counsel in this case, and, in most of these cases you are lead counsel. Why there may be some, you have to look at it overall and then we run into a very difficult area. Like I

say there may be, so far as the structure and how these things came about, that is one thing, but I don't think those things address itself to this Court in this case.

MR. BLACKSHER:

Well, another point we would make, your Honor, in a situation where the entire citizenary has to depend on these particular boards and agencies for their livelihood.

THE COURT:

I am not talking about the other boards. These that require special skills are those to which I refer.

MR. BLACKSHER:

Yes. Those boards pass on applications for things like licenses and permits.

THE COURT:

Well, would you contend that you should put a person who has no knowledge in that position just because they are black or would you fly in an airplane with a pilot because he was black and not qualified?

MR. BLACKSHER:

I would say, in the light of testimony of Mr. Randolph, with respect to difficulties for blacks getting permits to be plumbers where there are qualified black plumbers or electricians, a responsive government would make some effort to see that they are represented on these boards.

MR. ARENDALL:

If your Honor please, I don't recall any testimony being given as to mistreatment by any of these boards.

THE COURT:

Go ahead. I will let you gentlemen make further statements. Like I say, this is my only forum to make such comments and make my views known. It is impossible to go into details on any decree, whichever way the case goes, one way or- the other.

MR. BLACKSHER:

Mr. Mims, I would like to talk about your testimony concerning the master drainage project. You say that began in 1972 and was approved or what?

A If my memory serves me correctly, it was presented by the public works commissioner to the board of commissioners in 1972 and was improved and we began to try to program funds for this massive drainage program.

Q What is it going to accomplish?

A Well, it is going to alleviate flooding and correct erosion problems in many areas of the city.

Q What work is being done, now? Is it all being done by engineers somewhere in an office?

A Well, Mr. Blacksher, I would like for you to get in a car with me and I will drive you over the City.

THE COURT:

No, let's don't engage in that kind of answer.

A Well, we completed one not too long ago in Toulminville. We have one underway in one of your law firms' communities at Laurel and Devitt. We have a saltwater branch off of Dauphin Island Parkway. We have completed a two million dollar project called the Southern Drain in the southern part of the City here.

I have a list of projects that are being built now. I usually carry a list in my pocket so I will know where people are working and big stickney, for instance, has been underway and that is the one I just referred to, Saltwater Branch.

Here is community development project and here is one in the Texas Street area. The Zeigler Boulevard culvert. We just awarded a contract this morning at seven-thirty, incidentally, when we met for conference. Alba Club Road, Arnold Road -- they are all over the city. Icehouse Branch, Claridge Road, Bolton Branch, Broad Street widening and drainage project.

Q Is this master plan spelled out in one document somewhere?

A Yes. We have a brochure or folder or master drainage program. We have some projects that are being done on master

drainage and some projects being done under capital projects and capital improvement funds and under the community development funds. So, we have four major funds that we are talking about, plus we do a lot of drainage work out of the operating budget through the regular public works forces.

Q What about the Three Mile Creek drainage project, Mr. Mims? What is happening on that?

A Well, I testified earlier that we had met with the Corp of Engineers and because the Three Mile Creek runs into Mobile River and that is part of the Tennessee-Tombigbee system, we are going to be able to get assistance from the Corp of Engineers and from the Federal government in the improvement of this major stream that runs all the way across the city from the western city limits all the way to the eastern city limits, you might say, or to the Mobile River. This is a major drainage system and it will be improved and is being improved. We have dredged it on a number of occasions and we have a regular maintenance program of Three Mile Creek and we plan to make other improvements as we receive the recommendations from the Corp of Engineers.

THE COURT:

All right. Let's take a fifteen minute break.

(RECESS)

THE COURT:

All right. You may proceed.

MR. BLACKSHER:

Before we get back to drainage, Mr. Mims, I wanted to say, for the record, that with reference to the remarks you said earlier -- I mean, this sincerely, I am not trying to make you out a racist. I think the Court understands what we are trying to show, what the Plaintiffs are trying to establish, that white people who live in a different culture from black people who live in different neighborhoods have difficulty relating and responding to problems of black people and that is all I am trying to demonstrate and I wanted to make sure you understood that.

THE COURT:

Let me make these remarks in relation to what I said about the boards and what census figures show about black skilled workers. I do not mean for the City Commissioners to take from that, that they don't have any duty. The courts frequently required affirmative action to recruit black people. So there won't be any misunderstanding, I was just probing the Plaintiff's position and then there were some remarks that I indicated that I wanted to make, because this is my only forum. Go ahead.

MR. BLACKSHER:

We were talking about the master drainage project. I wanted to ask you, particularly, about the Three Mile Creek drainage project, Mr. Mims.

You said there were three water sheds in Mobile; Three Mile Creek, Dog River and one other, right?

A The Mobile River.

Q What is going to happen -- what kind of work are you going to do to make the Three Mile drainage project an adequate drainage service for the community it serves like I saw it starts over in west Mobile. The complaints we have heard to date have been from Trinity Gardens, Crichton, right down on Davis Avenue where the Roger Williams project are all frequently flooded and what other areas?

THE COURT:

Just one moment. Did I leave something out that you wanted to comment on?

A Well, let me say this. The area that has complained the most is in the vicinity of Stanton Road and Tonlours and Shadowgay area. They have had more flooding and more complaints in this area than any other area along Three Mile Creek since I have been in office.

I know, for a fact, that water has gotten up into houses along the area of Shadowgay, which is just off of Stanton Road.

Q Is that a white community, Shadowgay?

A Yes.

Q Tonlours is a changing community?

A It has changed, is my understanding.

Q It is now a majority black?

A It is now changing. I don't know what the percentage would be. As I indicated earlier, this is a major watershed or drainage easement and a great portion of the water that falls in the City of Mobile, sooner or later, comes out of Three Mile Creek up here on Three Mile Creek north of the docks. The Corp of Engineers, in their study, will present evidence as to certain culverts that need to be replaced or certain bridges that need to be replaced that might be causing an obstruction, things such as this.

It is very doubtful that the Corp of Engineers would ever recommend that Three Mile Creek be paved from one end to the other. You know, there is just some things you don't do. We have had recommendations from some citizens, both white and black that we, you know, pave Three Mile Creek or put it under ground or put it in a culvert and things such as this that are absolutely not feasible. So, we are saying that when the Corp of Engineers presents its recommendations to the City and hopefully, at that time, we will get some Federal funding, because the Corp is involved and then we can make the

improvements that would be necessary to provide good drainage. It will not necessarily mean it will be a paved improvement or a covered improvement or some exotic looking drainage system. It may still be a hundred years from now an open creek. The idea is to provide drainage to keep areas from flooding.

Q Do I understand that you, at the present time, do not know for sure what you are going to do about the overall Three Mile Creek drainage project. You are still waiting on something from the Corp?

A As far as Three Mile Creek itself is concerned, we are making improvements to various tributaries going into Three Mile Creek like the big Stickney, the little Stickney, the Trinity Gardens Drainage, much of it will go into Three Mile Creek.

Q What are you doing in Trinity Gardens right now?

A That is included in the community development monies that will be, I am sure, presented later in this trial by some of our staff people. The whole program will be presented, but we have plans to try to drain Trinity Gardens. So we can get on with the paving of the streets like we wanted to do these low many years.

Q Those are still in the planning stage, the drainage projects for Trinity Gardens?

A Well, I consider anything in the planning stage until you start turning the earth. But we do have definite plans and, as I said, these will be presented by technical people and members of our staff later on in this trial, I am sure.

Q Can you give the residents of Trinity Gardens and Crichton some word about when the drainage problems will be solved for their neighborhood or will be improved?

A Well, of course, we have been in the process of making improvements all along. All improvements are not necessarily from capital expenditures. Many improvements are made from a maintenance standpoint and we have, from time to time, made corrections here and yonder with our local public works crews. For someone to say that we have not improved the drainage in Crichton and Trinity Gardens I think would be a misstatement. It has been improved.

The first time I went to Trinity Gardens you almost had to fly over the area, to be frank with you. It is so low. We have made improvements.

We have not reached utopia there, but we do have definite concrete plans and hopefully some of this work will be put under contract in the very near future.

As I said, I do not have the community development program before me. Neither do I have the master drainage

program, but all of this has been programmed.

Q Will the community development program that will have a time table in it that will answer my question?

A Yes. With appropriate maps and everything.

Q Have you calculated and will we be presented evidence on how much money has been spent by the City of Mobile on the Three Mile Creek drainage project and the other drainage projects.

MR. ARENDALL:

Mr. Blacksher, the answer to that question is that we have never asked anybody to compile an itemization of expenditures related directly to Three Mile Creek, but we will have the staff people to give you the details about what is projected for it.

MR. BLACKSHER:

The reason I asked Mr. Mims, of course, is the little we have to go on -- this October, 1973 newspaper article that indicates that the public works department, which is your area, was allocated some eight hundred and ninety-eight thousand dollars for Three Mile Creek area drainage programs; four hundred and sixty-two thousand dollars for downtown area drainage program and some nine hundred and forty-nine thousand for the Dog River area drainage program.

It is things like this that have given rise to the

question, in our minds, about where most of the money is being spent. Do you see the Dog River project or the Dog River drainage problems as being more difficult to solve or warranting more expenditures of money than the Three Mile Creek project?

A Well, the reason that some of these projects moved ahead faster than others was because some of the plans were more complete, at that time. Now, I don't have that article in front of me, but we run into all kinds of problems as you start planning and designing, not only drainage projects, but road projects or anything else.

You run into rights-of-way problems. You run into things that sometimes are beyond your control and so if you have "x" number of millions of dollars allocated for each year's program you go ahead with the projects as you have, you might say on the shelf, the design and everything you have on the shelf, and you go ahead with it.

Now, in that particular instance, apparently the plans by the Volkert Company, now, they handle the Dog River drainage easement or watershed. Apparently those plans were ready to roll and so we proceeded. That does not mean that the Three Mile Creek watershed is taking any lesser priority. It may mean that converse, who is the engineer on that watershed, may not have had their plans ready or there might have been easement problems.

We find a lot of people are quick to complain, but when you go out to try to get an inch of their land to get the improvements on and then you have to take them to Court, too.

Q Have you been to Court over the Three Mile drainage project?

A I cannot say specifically, but I do know on many, many of these projects we have problems after we have worked hard to try to get the money allocated and after we have the plans prepared and after we have the light on green and ready to go and then we run head in to property owners who do not want to co-operate, as far as the right-of-way is concerned. That is a problem not only in black areas, but in white areas in every area of the community.

Q You don't know whether they have more problems with that in the Three Mile Creek area than the Dog River area?

A No. I can't answer that.

Q Do you know specifically why the Dog River plans were advanced more quickly than the Three Mile Creek plans?

A I just tried to explain that. We have three engineers, Converse on Three Mile Creek, Pollyengineering on the downtown river system and David Volkert and Associates on the Dog River project or system and all three of these engineering companies are studying their watersheds and their

prepared plans on these various projects related to those watersheds and some plans are more advanced than others. So, that is the best I can answer that question.

THE COURT:

I take it your answer to be the Dog River plans were developed earlier than the Three Mile Creek plans?

A I would say so, your Honor.

THE COURT:

All right.

A Let me say, for the record, if I may, that there certainly has been no reason on the part of the public works commissioner or the city commission to hold back on Three Mile Creek watershed, because it does affect a huge area of our city and it is our desire to try to get all of these projects done as quickly as possible.

I wish that I could snap my finger and do all of them between now and the first day of August, but it is just a lot of work involved as our people will try to show you, I am sure.

MR. BLACKSHER:

While we were talking about Trinity Gardens in the direct testimony, you recall the point being made that a million dollars being spent in the Trinity Garden area and twenty-seven thousand dollars in collected taxes and I want

to clarify this point, however. Do property taxes provide a very large share of the City of Mobile revenue income from its citizens?

A Not necessarily, no.

Q In fact, most of the revenues of the City of Mobile comes from other kinds of taxes; isn't that correct?

A Well, sales tax would be our main source of revenue.

Q And, of course, there is no way for you to know how much of that was attributed by residents of Trinity Gardens?

A Well, I don't think anyone, even the best of experts, could tell you exactly how much money came out of Trinity Gardens.

Q I agree with that. With respect to street paving, now, we have these -- this information that was turned over to us by your people, a Mr. Chapman, which is Exhibit 74 and which we have summarized in Exhibit 75 and when we introduced it, Mr. Arendall made the point that a number of some of the streets are paved by private developers and I think you re-affirmed that on your direct testimony.

Have you sorted out the number or miles of streets that were paved by private developers as opposed to by those that were paved by the City of Mobile?

A No. I have not and I have not seen your Exhibit.

MR. ARENDALL:

Mr. Blacksher, we expect to put Mr. Summerall on who knows whatever there is to know about that. He is the paving man.

MR. BLACKSHER:

You did testify about resurfacing, Mr. Mims, didn't you? I think you said resurfacing is not assessed to the property owners?

A Resurfacing is out of the general fund budget.

Q This Exhibit by Mr. Chapman says, at the bottom, that the information contained herein includes the miles of gutters, paving and also includes resurfacing of streets that was done by the city both before and after 1970, but you are not familiar with this Exhibit and you haven't apprised yourself of exactly how many miles have been developed, repaved or resurfaced in the various neighborhoods?

A Well, I am not familiar with your Exhibit. I say emphatically we do not charge for resurfacing.

Now, on a street like Lincoln Street, which was a hard surfaced paved street, in my opinion, testimony previous in this Court indicated that that person did not think it was paved, but it was paved, as far as I am concerned.

Now, we are going out and tearing up a paved street and we are putting down underground drainage and curb and

gutters and that is an assessment program. If we go down St. Joseph here on Dauphin Street or Gill Road or Dogwood Lane or whatever it might be, we resurface the street at no cost whatsoever to the property owners. It comes out of the general fund, our operating budget of the City of Mobile or capital outlay from the capital budget for the purpose of re-surfacing. There is no assessment.

I don't know what Mr. Chapman has said there. I haven't seen that. If he said we are charing for re-surfacing he is in error.

Q Why couldn't you re-surface the Lincoln Street?

A Well, sir, I have tried to say all the time that Lincoln Street was a surfaced street. It had a hard surface. It was a paved street and .....

Q I am asking if it was paved why couldn't you just re-surface it?

A Because there were a drainage problem. This was a complaint that people had built down on the lower side of the street and I am very familiar with Lincoln Street. I have been there many times. On the north side of the street the houses were built in many cases lower than the crown of the paved Lincoln Street. Therefore, the water would go off of Lincoln Street down into the yards and under the houses and, in one case, the person who was complaining had

a big long limousine type of an automobile and we suggested we put a curb up there or berm to keep the water from going into his yard and that would affect him from getting in and out of his driveway. When they came to the place where they were willing to pay part of the construction costs of what you might say is a new street and that is what is going to be when they finish, then we proceeded with the project. So, I am sure, over a period of years, Lincoln Street was re-surfaced.

In fact, I am positive that Lincoln had a new surface put on it, from time to time, over the years.

Q Concerning this assessment question, how is it that you know until recently the residents weren't willing to bear the assessment?

A Well, sir, I had met with a Reverand Smith on many occasions. In fact, in 1965, prior to my first election, I sat on Reverand Smith's porch and also he has indicated to the contrary, but I promised him I would look into it and I did look into it and I had looked into it a number of times and had talked to Reverand Smith on a number of occasions and .....

Q And Reverand Smith told you that people would not bear the assessment?

A Reverand Smith, to the best of my recollection, forever

made demands. Number one, that he was a taxpayer, which I understood quite well; and, number two, the City ought to come out there and do something about his problem and my contention was that we ought to be doing something about the dirt streets and the unimproved areas of the city first and then, as money and resources were available and as people wanted to participate, then try to correct some of these other problems of long standing and so it was not until about a year ago or whatever dates the documents show that they agreed to pay an assessment on Lincoln Street and it was, at that time, that the City Commission moved forward with the project taking two-thirds of the money out of the City treasury and one-third of the money will come back from the project. Over a ten year period, we will get one-third of it back from the property owners.

It was not until they expressed a desire to share in the cost of it that we went ahead with the project.

Q So the answer to my question was no?

A Well, I don't know what the question was now.

MR. BLACKSHER:

Would you read it back?

THE COURT:

He wanted to know back in the beginning whether or not he refutes or the property owners refused to be assessed.

A Your Honor, they did not indicate that they would be willing to pay.

THE COURT:

Did they indicate that they wouldn't?

A That they would not pay?

THE COURT:

Yes.

A They did not indicate that they would pay. It was more a demand that we come out and do something, because he was a taxpayer and the most vocal one was Reverand Smith.

THE COURT:

In those discussions, did you inform them of the necessity of property assessments?

A I could not say, under oath, your Honor, that look you are going to have pay so much a foot, but it was understood that everyone paid an assessment on street improvements. I am sure that was during our comments.

THE COURT:

When you say everybody understood, is that a matter of common knowledge or from your discussions, he could not fail to understand it?

A I think from our discussions he couldn't fail to understand it. Somebody had to pay for it.

THE COURT:

No, no. Somebody having to pay it and whether a citizen has to pay it are two different things. Did you tell him there was a property assessment?

A Your Honor, I couldn't specifically say that I told him he had to pay so much. I thought it was specifically understood that everybody had to pay.

THE COURT:

Go ahead, Mr. Blacksher.

MR. BLACKSHER:

Mr. Mims, would you agree that black citizens in Mobile do have particular rised interests peculiar to them?

A No. I could not say that they have particularized interests. The whole community has interests.

Q Well, since you have your book, for Christ and Country before you, the kind of thing I am talking about is discussed on pages sixty-seven and sixty-eight. I would like to read these sections, if the Court will permit.

THE COURT:

Go ahead.

MR. BLACKSHER:

"We can no longer live in the days of our forefathers. Negroes no longer live down the lane and pick cotton. The black man has been thrust into society. It matters not whether

we like this fact. There is no escape. This problem must be faced."

Then over on the next page -- I am skipping, but you can fill me in any time you feel like there is something you want heard. "Reasonable white men must also realize the predicament of the blacks. Since the 1954 Civil Rights decision, the American negroe has made much progress, and many white men have changed their atitudes toward the race issue. However, many thousands of negroes find themselves totally unprepared to assume their places of responsibilities in society.

Reasonable white men must realize that the negroe needs training and education, and that in many cases he needs to be advanced culturally. Reasonable white men must patiently go through this period of adjustment."

That is the kind of thing I am talking about Mr. Mims. Don't you agree that those kind of interests are particular to black citizens of Mobile?

A Well, I think the whole community has needs and what I was trying to do in this chapter of my book was to show that reasonable white men and reasonable black men and reasonable Americans could work out the problems that we have and of course, you have to take into consideration that this book was published in the fall of 1969 right on the heels of

all of the racial trouble that we had had in this country.

Q Well, now, concerning reasonable men, and let me ask you, your views on this part at the bottom of page sixty-eight, will you say that the "negroes also must be reasonable. They will have to realize that the events of a hundred years cannot be changed in the snap of a finger. The militant negroes want everything now. This is impossible. The businessman starts small and grows. The farmer plants a seed and cultivates before he gets a harvest. And it is my firm conviction that the shouts and demands of the negroe that the position of the negro race as a whole be changed now, will never get the job done. If those who shout "now" would spend half their energy trying to help the negro advance, they would accomplish far more."

Do you still feel that way about the so called negro problem?

A No, because you have a period of what, seven years now, of basically harmony among the races in our community and, at that time, as I said a moment ago, this was right on the heels of the marches, right at the time where there was a group, incidentally, called NOW when there were burnings and there were threatenings and all kinds of things going on and turmoil in the community and people were demanding and shouting and marching on City Hall and marching on the city audiotorium

and had demonstrations in the streets. What I am trying to point out in this particular chapter of this book that was published in 1969 was that reasonable white men and reasonable black men are going to have to sit down and white men are going to have to realize that there is a responsibility at hand and the black people are going to have to realize that they have responsibility also.

So, my main point here was to prove as reasonable people set down they could work these things out. Of course, there are other things that you skipped over. You skipped over sections of this chapter that -- all of it is very meaningful. For instance, you can read some of the things. I will not go into it.

Q Let me ask you one more question on this what is reasonable. I would like to read you a statement made by a prominent black politician and ask you if this is reasonable.

"The wisest among my race understand that the agitation of questions of social equality is the extremest folley, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of aritificial forcing. It is important and right that all privileges of the law be ours, but it is vastly more important that we be prepared for the exercises of these privileges. The opportunity to earn a

dollar in a factory just now is worth infinitely more than the opportunity to spend a dollar in an opera house."

Would you say that is a reasonable attitude for a black politician to take?

A I would say that is reasonable. I would have to digest that sentence by sentence.

Q Let me point out that this statement was made by Booker T. Washington, September 18, 1895 at the Atlanta Cotton States and International Exposition and, of course, what I have reference to is that your point about the things that can't be changed in a snap of a finger, that occurred over a hundred years ago. That was four generations ago, Mr. Mims.

A Well, sir. I can't help what my father did or what my grandfather did. In 1965 I saw a great need in this community for some leadership and I was very happy in business, but I saw a great need for service and I offered myself as a candidate for the Mobile City Commission and for eleven years my sincere desire has been to meet the needs of this entire community,both black and white, and I have devoted eleven years of my life to this task and the record is there and you can search it from 1965 on, on October 4th, until this day, and if you would be reasonable you would say that Lambert Mims has tried to meet the needs of this community.

Q Let me ask you, then, sir, the same question I asked Commissioner Doyle about City ordinances for fair or equal employment opportunity, for open housing, for public accomadation, and the cross burnings legislation. Would you be in favor of city ordinances on those issues?

A Well, on some of those matters they are covered by federal laws and regulations that would supersede anything we do anyway. So, it would be a waste of time and effort and paper for the city to pass an ordinance about open housing. I think people should live wherever their economic situation will permit them to live.

If you can afford a forty thousand dollar home you ought to be able to buy a forty thousand dollar home wherever it is. If you can't afford but a twenty thousand, well, a lot of people can't afford but a twenty thousand. I am not opposed to people living where their economic situation will allow them to live.

I see no need for a city ordinance for that. I think, as an American citizen, you have that right.

On the cross burnings, I deplore cross burnings. I do not condone that in any shape, form or fashion. I brought the two reverands who wrote me, Reverand Stokes and McCree and sent copies to everybody and his brother and said silence might mean that you condone or something like this. I wrote

those bretheren back -- and I think Mr. Arendall has a copy of a letter and told them, "You men know me better than to say that I condone such things as this." What a person does on his personal property, as long as he complies with the Board of Health regulations and the fire codes and what not, I don't think I ought to get involved in telling him what he is doing on his property. If he wanted to fly a red flag on his property, then that is his business.

Now, I would have no reason to oppose an ordinance that would make it a fine or make it an offense against the city to burn a cross on public property, on the right-of-ways. I imagine that that would be already included in one of our ordinances. If it is not, I certainly would not oppose an ordinance that would make that an offense against the city.

Q Are you going to investigate whether or not it is already on the books? If not, are you going to propose such an ordinance?

A I would be happy to propose such an ordinance. I, you know, have not had reason, up to this point, to pursue it, but I think it should be an offense against the city to burn anything on the City's right-of-way, crosses, boxes or trash. In fact, I wish some people would quit burning their trash in the curbs or gutters. Some people burn that and push it

into the storm drains and that helps with our drainage problems.

Q Just a couple of other points, Mr. Mims.

One last point about something you said in your book. You mentioned, I think, in there that it cost you thirty-five thousand dollars in your first campaign for City Commission. I think that is on page seventeen. That was the first indication I have had of firm evidence in support of what has already been said here about what it might cost to run a City Commission campaign?

A Well, I believe I said we actually spent more than thirty-five thousand dollars and although this was a lot of money for a political novice to raise, it was probably a small amount as to probably what some people were spending. In fact, the opposition, at that time, perhaps spent .....

Q Nineteen sixty-five?

A Yes. The opposition, perhaps, spent far more than that, because an incumbent was running and so was the chairman of the Democratic committee, at that time, and so was the son of a former mayor who was a well known man and here I am a farm boy from Monroe County came down to Mobile and, you know, and had an opportunity to run for City Commissioner and only in a free country like America could a guy come out of the cotton patch to Mobile and get elected.

It was because of hard work and shoe leather and getting people to help you and then getting people to help you I was able to beat all of the odds, according to all of the political prognosticators. You know, this guy, Lambert Mims, who is he? I had God on my side. I feel he led me into the field of politics and I feel he put me where I am today.

Q Yes, sir. So you would say, at the present time, it would probably cost more than thirty-five thousand dollars to run a successful campaign on the City Commission?

A I wouldn't be surprised what with advertising and media costs that it would be far more than that.

Q Mr. Mims, isn't it true that you are responsible for Senator Perloff blocking this Roberts bill that would change the form of government?

A That has been rumoured in the media, but that is not true.

Q You haven't spoken to Meyer Mitchell about it, have you?

A I speak to Meyer Mitchell about many things, but I have not spoken to Mr. Perloff about it.

Q I asked you if you had spoken to Mr. Mitchell about this bill?

A Mr. Mitchell and I have discussed the form of govern-

ment in Mobile on many occasions. In fact, Mr. Mitchell is a very strong proponent of the commission form of government. He operates in many cities and he says this is the strongest form of government.

Q You are also a strong proponent of the commission form of government?

A I believe with all of my soul it is the most responsive form of government that the people of Mobile could have. I do not know how any mayor, any nine councilmen or nine commissioners or nine aldermen could be any more responsive than this City Commission is being, at this time.

My policy is to try to treat everybody with a courteous reply and to move with a quick response and to have a thorough follow through and I attribute that to my success and the fact that I have been re-elected three times to this office that I am privileged to hold.

I think we are responsive and some of these people that have testified in this trial that they wanted this and they needed that and, so help me, many of these people have never crossed my threshhold into the office of the public works commissioner of this city.

Q Mr. Mims, do you disagree with the other people that have testified that, in their opinion, that a black person could not be elected in a city wide race for the City

Commission?

A I don't necessarily subscribe to those feelings. People said a country boy from Monroe County couldn't get elected to the Mobile City Commission because of the nature of the politics in Mobile, but we proved them wrong. I think a person who is qualified, number one, a person who is willing and a person who is willing to put forth an effort, the effort it takes and a number of things to win an election. It takes a willing hard working candidate and he must be qualified and it takes people to help.

You can't do it by yourself and it takes some money and you have to go out here and not be bashful and ask people to contribute to your campaign.

Q Are you saying all things being equal that a black candidate would have as much chance to win, at large, as a white candidate?

A I think the right black candidate that would present himself as an American citizen qualified to hold whatever office he is seeking would have a chance to be elected in Mobile, Alabama.

Q My question was, the same chance as an equally qualified white candidate?

A Well, yes. I think a black person who presented himself as a businessman or as a qualified person who got

out and worked and sold himself on the fact that he was qualified, I believe he would stand a chance of getting elected to any office if he presented himself or herself, not as a colored person, not as a black person, not against white people, not for white people, but to go out and present themselves on the fact that they are qualified and they were sincerely interested in serving this community. That is what the people want, somebody sincerely interested, not who is the whitest or I am the blackest or I am the richest or the poorest. They want somebody who is dedicated or sincere in their efforts.

Q Can you point to any evidence that would support this opinion you are expressing and, I take it you are saying that the black candidate would have as good a chance as a white candidate, all other things being equal?

A I am saying that there are some black people in this community who could run for any office and stand as good a chance of being elected as I stood in 1965 when I ran for office the first time, probably better.

Q What evidence do you have to support that opinion?

THE COURT:

Why don't we go onto something else?

MR. BLACKSHER:

Yes, sir. So, you are not in favor of City government

being elected out of single member districts?

A I stated that I was a firm believer that the Mobile City Commission or the Commission form of government for now sixty-five years has responded and is responding more and has responded more in the last decade than ever before to the needs of this community and the record proves it.

MR. BLACKSHER:

I have no further questions, your Honor.

THE COURT:

Mr. Arendall?

REDIRECT EXAMINATION

BY MR. ARENDALL:

Q Mr. Mims, may we have your book that there has been so much talk about? I think we had better offer it all in evidence.

MR. BLACKSHER:

I didn't offer mine, your Honor. It was Mr. Menefee's and he wouldn't let me offer it.

MR. ARENDALL:

I offer, in evidence, for Christ and Country.

THE COURT:

Thank goodness it is a little book.

(Defendant's Exhibit number 86 received and marked, in evidence)

MR. ARENDALL:

Q Mr. Mims, I overlooked asking you on direct examination about a couple of things that I would like to ask you about very briefly.

Would you state generally what the current policy of the City of Mobile is with reference to garbage collection?

A We collect refuse. We call it our solid waste collection division. That division collects refuse from about seventy thousand residences, twice per week, and we furnish trash pick up with another division once a week.

Q Is that policy applied equally over both white and black areas?

A Absolutely.

Q What is the City's policy with reference to street cleaning?

A Our city is divided into -- if I am not mistaken, about fourteen different areas and we have a street sweeper assigned to each area and the streets in those particular areas are swept on a regular basis.

Each piece of equipment and each operator has an area assigned and these areas are assigned without regard to race or color or community or any other thing.

Q All right. Now, we have had an awfully lot of talk about commissions, boards and so forth. For about ten minutes, I would like to ask you a few more questions.

THE COURT:

If you will give the number when you refer to a board.

MR. ARENDALL:

Judge, I propose, in an effort to save time, to go ahead and introduce such material as we have on each of these boards and commissions as to which Mr. Blacksher has asked any questions. I don't know any better way to do it.

What basically we have, as to each, is a statement of members and a copy of the applicable ordinance and I don't propose to ask any questions about most of these. But they have not been marked, because we had not contemplated that it might be desirable to put them in. I suppose the best thing for me to do .....

THE COURT:

I really think it would be helpful to make it part of the Exhibit 64 and then it will be altogether and can be considered together.

MR. BLACKSHER:

I certainly have no objection, your Honor. It was just a huge volume of material.

THE COURT:

Let's make it part of Plaintiff's 64.

MR. ARENDALL:

May I ask a few questions and then give them to Mr. O'Connor?

THE COURT:

Surely.

MR. ARENDALL:

Now, I have not got, in this bundle of them, I have only selected those that I understood Mr. Blacksher asked questions about.

THE COURT:

I understood that.

MR. ARENDALL:

Mr. Mims, I notice that on the board of adjustment, one of the members is Dr. R. W. Galliard.

Do you consider him ready, able and willing to speak on behalf of black interests and the N.A.A.C.P.?

A Yes, I do.

Q On the audiotorium board, let me run these names out and I wish you would stop me when I get to a black, if you would? Charles Bedsole, William Ladner, Joseph Baker, Robert Brazier.

A He is black.

Q Thomas J. Gengo; Mrs. W. L. Russell?

A She is black.

Q John H. Castle; Taylor Hodge?

A He is black.

Q Dr. W. A. Ritchie; Mrs. Shepherd Jerome; Thomas Bryant, Jr.; Richard A. Rowan.

Do you consider the blacks who are on there, such as Mr. Taylor Hodge and others are fully capable of speaking up for the black interests?

MR. BLACKSHER:

Are those presently on the audiotorium board?

MR. ARENDALL:

I am told by Mr. Greenough that they are.

The center city development authority is one of the authorities that does not appear to have any blacks on it, but I would like for you to identify, for me, Mr. James Van.Antwerp, Jr.? Is he not a member of a family that owns a great deal of downtown real estate?

A He is.

Q Mr. Ken L. Lott is president of the Merchants National Bank, which also owns downtown real estate?

A He is.

Q Who is Mr. Don Henry?

A He is manager of Gayfer's downtown store.

Frank Schmidt; Gerald E. Williamson and Ted Hackney, secretary of the chamber of commerce.

Do you regard each of these gentlemen to be outstanding business men in the city of Mobile?

A All of these men are outstanding business men.

Q All right. Now, until the recent formation of a bank that I believe is called the Commercial Bank -- Commonwealth Bank, a minority black financed and organized institution, was there such a thing as a minority bank in Mobile?

A Not to my knowledge.

Q I will ask you if it is a fact that a white woman is president of that bank?

A Yes. She is.

Q The members or the bankers on this committee are the chief executive officers of the four largest banks in the City, are they not?

A That is correct,

Q There has been some talk here, Mr. Mims, about the library. Does the Mobile Public Library offer its services or facilities to all citizens of whatever color?

A Yes, it does.

Q By virtue of change in housing patterns, as a matter of fact, the main building is now in a black or certainly highly

integrated area, is it not?

MR. BLACKSHER:

I object, your Honor. There is no evidence that it is and I would disagree.

THE COURT:

I will let him give an opinion.

MR. ARENDALL:

Maybe it isn't. I will ask you, do you consider the location in a black or white part of Mobile?

A In my opinion it is a mixed area and predominantly black.

Q Are you familiar with the location of the various branches of the library?

A Yes.

Q Would you identify each and state where each is located and indicate whether the area is predominantly black or white?

A Well, we have a very fine branch in Toulminville that is predominantly black. We have a branch on Davis Avenue that is predominantly black. Dauphin Island Parkway, down in the area where I live, that is about twenty percent black, I would say, at South Brookley. We have a branch in Cottage Hill. Black people live all around the Cottage Hill library.

Q That is a predominantly white area?

A That's right, and there is a branch in Springhill.

Q That is the Moorer Branch?

A Yes.

Q Mobile Planning Commission, the membership is, and again, I would like for you to interrupt me when I get to a black member.

John L. Blacksher; Joseph M. Courtney; George L. Langham.

A He is black.

Q Robert H. Massey; E. Allen Sullivan, Jr.; and James C. Van Antwerp.

Now, with the exception of Mr. Langham, all of these are white, are they not?

A Yes.

Q Do you regard Mr. Langham as being ready, able and willing to speak for whatever particularized interests, if any, blacks may have in regard to the Mobile Planning Commission matters?

A I do.

Q Mr. Blacksher got after you about the policemen and fire fighters' pension and relief fund board and let me read the membership of this to you.

Dwayne Luce, is vice chairman of the board of the

adjacent to Williamson High School that there was testimony about yesterday.

THE COURT:

Is that predominantly black or mixed?

A I would say predominantly black.

Q Ward thirty-two, Trinity Gardens?

A Up here.

Q All right. Mr. Greenough, if you would get back on the stand for a minute, please.

I would like an expression from you as to whether you consider the parks and recreation program of Mobile is operated in a fair or unfair amount insofar as blacks and black areas are concerned?

A Well, I would have to say that on that balance we probably have committed a larger proportion of our resources to parks and recreation to the black population than we do to the population of the City generally. I think that is fairly obvious if you look over the dispersion of the parks and the major recreation centers.

One thing that is a burden to us in Mobile, we operate a pre-school program, because the Alabama Legislature has not seen fit to provide one for the citizens of the state in the public sector and we recognize that this is a need. So, we provide one through the city recreation department

which consumes roughly fifty percent of our staff resources. We would like to be able to devote those resources to other recreation programs, but until the legislature sees fit to act in that regard, we will have to continue.

I think that we are very fair, try to be, at any rate. We recognize that particularly in parks and leisure activity, it is basically voluntary, particularly when you are dealing with people's children. There is probably more controversy there among people than other normal business aspects of life, but on that balance, I would have to say that we are very fair.

Q You refer to pre-school programs. Precisely what is that, for what age children does that attend to?

A It varies, but generally speaking it is somewhere between the age of four and six and seven, depending on the particular program and the particular location. It is sort of like kindergarden.

We don't have licensed teachers. So, we are not technically giving classroom instruction, but we do teach the youngsters how to get along with one another and getting away from their parents at an early age.

THE COURT:

You made some statement that I missed a few moments ago. I thought you made some statement with reference

to the amount of revenue with reference to the races?

A Yes, sir. I said I would have to say that on net balance we spend probably a higher proportion of our resources on parks and recreation for the black population than the black population represents as a proportion of the general population.

MR. ARENDALL:

Are all of your facilities integrated?

A Yes, sir.

Q Is your pre-school program integrated?

A Yes, it is.

Q Mr. Greenough, you have been a commissioner now for what, three years?

A Two and-a-half, almost three years.

Q Do you consider you have been responsive to the needs of all citizens, both black and white, to the best of your ability?

A I certainly hope that I have, yes.

MR. ARENDALL:

No further questions.

CROSS EXAMINATION

BY MR. STILL:

Q Mr. Greenough, are you in favor of the continuation

the adoption by the City of Mobile of an equal opportunity job ordinance which would apply to businesses which were smaller than fifteen members?

A Well, I think I would -- I know my attitude and I think it is fair to attribute to my fellow commissioners that our attitude is performance rather than promises or ordinances unless they are enforceable and meaningful. There is not any point in having a great bunch of clamor and discussion that is not going to produce anything.

We provide, in all of our contracts and require of people that do business with the city government, equal employment regulations and so forth.

Q Does the city make any effort to make sure that is enforced?

A Yes, we do. We don't have a particular enforcement division, however, it is required of our staff people to review these things just as the prevailing wage rate is involved in most of our contracts and things of that nature.

Q All right. But do I understand you correctly that you oppose the adoption of an equal employment opportunity ordinance because it would be unenforceable?

A I didn't say I opposed it. If we vigorously proposed it, it would harm blacks, particularly in the CETA program.

Q I am talking about private programs in the City of MObile.

A We don't run private employment in the City of Mobile.

Q If you adopted an ordinance regulating private employment to provide that it had to be on a fair basis, equal employment opportunity, are you for or against such an ordinance?

A Well, I don't think that I can answer the question put that way. Let me respond this way. I think that our businesses in our nation have enough regulations now and just because you pursue a single purpose goal you can pursue it to the point that it is counter productive and I think that is what results in what you suggest, in my opinion. It is a matter of judgment, I suppose.

Q Would you favor the adoption of an equal opportunity housing ordinance of any sort?

A I think that the laws of the United States are sufficient to pursue that goal. What I am trying to say to you is I don't see where anything of substance or anything meaningful, in our community, would be gained by going through such a process.

Q Now, have you made any sort of an analysis, either as a City Commissioner or at the time you were with

Q The difference then being economic level of the group shown on the second page of this graph is higher than on the first page; is that correct?

A Yes.

Q Would you comment on that?

A Well, again, we have the same phenomena. This is the data that appears on one twenty of my desertation, again with 1973 added.

Roughly, the same in 1953 we had a rather low percentage difference between the two racial groups and it begins to increase in '57 and, in the 1960's it really peaks and really so in 1965 and in 1973 dropping down almost to the 1953 level.

Q Would you be seated again, please?

Dr. Voyles, Exhibit 28 reflects the ward by ward vote for each of the candidates in the 1973 election. I will ask you if the opinions that you have expressed are supported in any respect by the returns there for the blacks who ran?

A Well, I think it is supported rather well by the returns for the blacks in that particular election.

Q Did black voters support white candidates over those in their own race in that campaign, in that election?

A For the most part, yes, they did.

that Mr. Bailey's mean in these black wards was forty-three point three three percent of the vote in the first election and Mr. Taylor's was thirty-eight point one seven; is that correct?

A Yes. This is correct.

Q And that in the Mims - Smith race, Mr. Mims's vote was forty-three point four three percent and Mr. Smith's was forty-one point five zero percent; is that correct?

A Yes.

Q And now, looking at the third of these summaries, would you tell us, that is headed summary of data, shift of the black swing vote to Greenough in 1973 runoff, would you tell us what this reflects?

A The first section -- again, it is the listing of the wards by groups showing the returns for Mr. Bailey and Mr. Greenough giving the means for the low income black wards, the low middle income black wards and then the total mean which would be the combination of the two.

As you can see, as a total mean of the wards we classified black, Mr. Bailey received forty-three point three percent and Mr. Greenough fifteen point three nine percent in the first race and then, in the second race, below that .....

Q In the runoff, how did it come out?

A In the runoff, we did the same thing, which is the second group of figures. Mr. Bailey received fifty-nine point three percent and Mr. Greenough forty-three point two percent.

Q What effect, in your opinion did this shift in the vote in the black wards have on the Bailey - Greenough runoff?

A Well, it was very significant in the election of Gary Greenough as finance commissioner of the City of Mobile. As you can see by the figures, Greenough gained substantially more between the first race and the runoff than did Mr. Bailey.

Now, particularly when you consider that Bailey received -- oh, roughly forty-eight point one percent of the vote the first time, Mr. Greenough had his back to the wall pretty much in the runoff and this was a very significant shift in the vote.

MR. ARENDALL:

I offer, in evidence, these three summaries which I would like to have marked under one number and as A, B, and C, respectively.

(Defendant's Exhibit 88A, B and C were received and marked, in evidence)

MR. ARENDALL:

Dr. Voyles, did you notice any comparison or make any comparison between the vote of black groups of differing economic levels and so far as voting for black candidates is concerned when compared with black and white groups of similar economic levels voting for the eventual winners?

A I am not for sure I follow your question.

Q I will ask you whether or not the difference between black groups of different economic levels is greater in voting insofar as voting with black candidates is concerned than it was between black and white groups in similar economic levels in voting on the eventual winners?

A Yes. I believe it was.

Q I believe it has already been testified to, but is it a fact that ward ten was split fifty fity in the Bailey - Greenough runoff?

A Yes. Exactly each of the candidates got the same number of votes.

Q Dr. Voyles, as a political scientist, how do you value the importance to the fact that this improvement of the black vote for Greenough and the results of that 1973 election is in the overall voting patterns and political picture in Mobile?

A Well, I think we are running, throughout the south, Mobile included, to more normal voting patterns, a situation in which race will not be a major political issue.

Certainly not to the extent that it was in the 1960's.

Q In your opinion, during the 1960's was the black vote very cohesive?

A Yes. I think it was and even prior to the 1960's.

Q Is it fair to say that the non-partisan voter's league, for example, played a part in that cohesiveness of the black vote?

A Yes. I think they played a very significant role.

Q In your opinion, the 1973, had the impact of the non-partisan voter's league pink sheet endorsement substantially diminished and had black cohesiveness substantially diminished?

A Yes. I think it has. I don't want to imply that endorsement by the non-partisan voters league is not important, because it is. However, I think it is destined to happen once you get a larger block of voting that is more voters, it becomes very difficult for any one group to represent their total interest. As blacks become more

assimilated into the political system, endorsement groups are going to become less a factor, following somewhat the same pattern as the labor unions, but as we know, labor union endorsement in Mobile is not worth a great number of votes. All members do not vote the way their people endorse candidates.

Q Would you expect this trend of individual voter decision by blacks to continue?

A Yes. I think it would. I think individual is a good word, but I think also there is diverse interest in the black community that are going to be continued to be represented by other groups other than one nominating group. I think testimony by the non-partisan voters league members earlier indicated that they think this is true also.

Q What is your opinion as to whether the future sees white candidates appealing more openly and diligently for black support than in the past?

MR. BLACKSHER:

Is this a hypothetical question, your Honor? If not, I object, because there is no evidence in the record.

MR. ARENDALL:

It is asking him for his opinion as a political

scientist.

MR. BLACKSHER:

Is the predicate hypothetical or not?

THE COURT:

That is a hypothetical, giving an opinion.

MR. STILL:

The question is white candidates appealling more openly for black votes?

THE COURT:

I understood. That is what he would see in the future and that is the question and you may answer.

A Yes. I think they will. I see no reason why not to.

MR. ARENDALL:

In your opinion, if there is cohesiveness or to whatever degree there is cohesiveness of black votes, the power of the blacks would be represented by that cohesive vote, would it not?

A Yes. I think that hypothetically or practically, whichever way you want me to answer this thing, it ends up the same way. I think that any group that has cohesion in the Mobile community, and I believe the black community still does, will be able to represent a great deal of the electoral power on election day from the fact that the others

vote, as witnessed in the '73 race and also in the '76 county commission race, the other vote is split. The elections are very close and the white community has been very well split.

Anybody that can put together a block of votes has a very strong bargaining position in the community.

Q And to such extent as cohesiveness diminishes through the lessening of what is apparently called polarization, will that not require even greater effort on the part of white candidates to address themselves to matters of concern to blacks?

A Oh, yes, definitely. Because as the group becomes less cohesive, it is going to change the campaign style of white candidates in the black community. They are going to have to appeal to more interest through different ways, I expect, in the black community.

Q Now, Dr. Voyles, I would like to pass to the 1976 elections.

Did you have anything to do with that election?

A Yes. My firm provided the professional services for the Dan Wiley campaign. He was successful in winning the county commission, place one, the position filled by Mr. Yeager.

MR. ARENDALL:

I offer in evidence voting place count and turn out and votes for Bridges and Wiley in that election.

A I might add for the Court, these are the new wards. I believe these are the first Exhibits with the new reapportioned wards.

THE COURT:

So they have no correlation to these wards on this man here, which is Defendant's Exhibit -- what is the number of that -- those wards are not the same wards; is that correct?

MR. ARENDALL:

That is correct.

THE COURT:

All right.

MR. ARENDALL:

Then I offer Exhibit 32, which shows additional data with reference to that Wiley - Bridges race.

(Defendant's Exhibits 31 and 32 received and marked, in evidence.)

MR. ARENDALL:

Dr. Voyles, in connection with your activities on behalf of Mr. Wiley in that race, did you have any occasion to determine whether or not the various candidates were seeking black votes?

A To my knowledge, each of the candidates in the place one race sought the black endorsement through the non-partisan voters league and also launched very vigorous advertising campaigns in the black community.

Q There has been some talk here about the cost of elections in house districts and comparison with at large city elections.

In your opinion, how much cheaper, if any, would it be for one to launch a vigorous campaign in a contested election in a house district race in relation to the cost of a city commission, at large, race?

A I think it would be very little difference between campaigning, at large, and campaigning in single member districts. If it was a vigorous campaign fought by two candidates that wanted to campaign hard. The reason I say that, the big expense in campaigning, regardless of the size of the district, is the media and the media rates are the same regerdless of the audience you are trying to reach.

For instance, we go down and buy a thirty minute spot on the T.V. and we have to pay the same rate.

THE COURT:

But do the district candidates address themselves to the same thing?

how can they be a pivotal vote?

A Not to the same degree. They still have cohesiveness, but you were doing a comparison thing. I don't think, for example, we are going to see in the 1970's returns from the black areas where one candidate has received ninety percent of the black vote as once was the case in Joe Langan's races. I think we are going to see or we did see in the 1973 - 1976 race simple cohesiveness within the black community, but nothing like it was in the 1960's.

Q Did you examine Lonia Gill's race for the school board in 1974?

A No. I have not.

Q And have you examined the data that we introduced into evidence in this case regarding Mrs. Lonia Gill's, the vote she received?

A No. I have not, but you are talking about the school commission race there where I think should be distinguished from the City Commission, county commission races.

Q Why is a school board race different than a county commission race? If we are talking about racial polarization within the city of Mobile?

A We are talking about elections that are on different levels. A school board race simply does not attract the attention nor the finances, the money being spent, as a

city commission, county commission race.

As a result, it is my belief that races like school board races, license commissioner races and things of this nature depend more upon the personality or the neighborhood that a person happened to come from, name identification that they have gained through some other way than say a city commission - county commission race. There are no issues in school board races.

Q Except perhaps whether you want the schools integrated or not?

A I don't think anyone really brought that up this last time with the exception of Mr. Westbrook, who ran last.

Q Let me understand this, are you saying that certain elections, certain types of elections, are so qualitatively different that they cannot be feasibly compared with a Mobile City Commission election to tell us the voting behavior of city voters?

A Yes. I think so.

Q Or is a presidential election primary in another state qualitatively different or qualitatively the same as the Mobile City Commission race?

A I don't know that I can really answer that other than we see the voting patterns. There it is, an election that gets a deal of attention.

Q Your running?

A But you also spend a lot of money and get a lot of name identification that does not occur in these minor races like the school board.

Q Well, is it the amount of money or is it the kind of issues that are raised?

A I think the amount of money determines a great deal the kind of issues that are raised. If you can spend -- let's take a figure of forty thousand dollars on a race. You are able to penetrate the voting market much better than you are say in a school board race where you are going to spend four or five thousand dollars.

Thus, a candidate running for a major office spending this type of money can start with very little name identification and build it in all segments of the community; whereas, you are going to run for the school board and say spend four thousand dollars and a person cannot afford to do that. That will not buy you very much time on the media. There are probably some factors involved.....

THE COURT:

Let's take a recess right here. Take a twenty-minute recess.

(RECESS)

THE COURT:

I make for political races and it is my belief that race is no longer an issue to the extent it was in the 1960's. A candidate that would raise that kind of issue today would cost himself as many votes as he would gain, if not more.

Q Are you familiar with Alexander Heards' book, "The New Negro Politics"?

A Yes.

Q He makes the statement, let me read you a statement and let me ask you whether you agree with it.

"The two elections -- that he has just talked about -- suggest the important conclusion that cohesiveness among negro voters lessens when their right to vote is not challenged, and when white candidates solicit their votes with the same impartiality that they solicit white votes. Certainly such as the experience in the upper south and in northern cities."

A Yes.

Q Would you agree with that?

A Yes.

Q He goes on further, "While the importance of one basis for block voting among negroes will decline as negro sufferage becomes better established, another basis for unity in negro voting exists. Thoughtful negroes hold a remarkably uniform view; most negroes are under privileged. They should

therefore support candidates advocating economic and social policies benfecial to the mass of under privileged citizens".

Do you agree with that statement?

A I think that is probably the case that blacks do represent a certain segment of the economic community.

Q Now, 1973 and in 1976 we have evidence that at least, in those elections and at least in the ones that we have talked about, the particular races we have talked about, that black votes were sought impartially?

A No. The races that I was involved in, yes, openly and impartially, I think.

Q Now, you are saying that you can tell that 1973 is not a deviating election from a racial polarized pattern, because it was reaffirmed in 1976?

A That is part of it, Mr. Still. I think also there is a certain amount of intelligence and logic we have to put to that. All we have to do is to watch the nightly news and compare what we were watching in 1965 and '66 and so on. It is a simple fact that race is not a major news getting issue as it was in the 1960's.

We don't have people marching in the streets. We don't have the situation of the conflict between white and black.

THE COURT:

ture in that field, didn't you?

A Yes, I did.

Q All right. Now, in preparing the extension into 1973 which you have shown us on the chart that you have presented in this case, what elections did you look at to come to the conclusion that you presented to the Court in your direct testimony?

A Nineteen seventy-three City Commission and the 1976 County Commission races.

Q All right. Now, in 1972 there was a governoratorial primary in the State of Alabama?

A Yes.

Q Excuse me, that was '74 and in '72 there was a Presidential election and in '76 there has been a Presidential primary, but you didn't look at any of those for the extension of the analyses?

A No, I didn't.

Q But you did look at that kind of election when you were doing your thesis, didn't you?

A Yes, sir.

Q Now, in doing your thesis you looked at all elections in which blacks had run, including school board elections, but in the extension of your analyses, you did not look at the 1974 school board race in which Mrs. Lonia Gill,

Q So you have to look at some background facts. You can't just look at the computer print-outs?

A That is what my committee told me when I first presented that.

Q I see. Now, have you taken into account the 1972 Presidential race, the 1974 school board race, the 1974 governoratorial race in coming to your conclusion that you have made here in the Court about the 1970's?

A No. I have not and, to explain why, if I may, the last Presidential race I think would have no bearing on it any more than the 1964 Presidential race would; that is, that it was an extraordinary race because of the candidacy of Goldwater in '64 and McGovern in '72.

I included the Goldwater race in the desertation because it chronologically fell in where I was talking about. The school board race, again, I do not think that those type of races have a particular bearing on the type of case we are talking about here. I think they are all together different, because of the name identification factor.

Simply put, there are no issues in a school board race. You win simply because of name identification and it is logical for the voters to do this in the school board races. The governoratorial primary, I did not look at that.

Q You also did not look at the 1970 County

Commission race in which Joe Langan ran, did you?

A No, I didn't.

Q Why did you exclude that?

A I didn't do county races in the desertation.

Q But you have included as an example of a supporting example for your conclusions about the 1970's, the 1976 race.

A Again, still the fact that Mr. Langan involved in the race is going to escue the race somewhat, the 1970 County Commission race, the fact that he was highly identified with the black vote.

Q If Joe Langan had run in 1976 for the County Commission, do you think the results would have been the same?

A I don't know. He had a lot of things against him besides the race. He had been out of office for an awfully long time. I think Mr. Langan could have won in 1970 if he had run the right kind of campaign.

Q Now, your thesis covered the City Commission election or elections from 1953 through 1969?

A Yes, sir.

Q Isn't it true, if we are going to do any type of political analyses like this, we cannot use one isolated election, but instead, we have to look at a trend over a

it would be difficult for a black person to win the race. I don't think it would be totally impossible.

Q But it would be more difficult than it would be for a white candidate?

A I think it would be. I think blacks are somewhat in the same position now that Catholics were in the Al Smith, John Kennedy races. Someone has to win nationally to solve this issue.

Q Now, you have told us that the 1973 races indicated a return to the type election we had in 1953?

A To a more normal period, yes.

Q How many blacks were registered to vote in 1953?

A I have no idea. It would be very slight.

Q It was probably less than a thousand, wasn't it?

A I really don't know. I think I gave the figures to you. I don't have them up here.

Q As a matter of fact, those figures are in your desertation in a chart, aren't they?

A They may be.

Q Dr. Voyles, you might want to step over here so we can look at this chart close up. I am referring to Plaintiff's Exhibit number 56.

Now, as you remember, this chart shows a

A Yes. I believe I did.

Q And the R, the Pearson's R, for place one, the Bailey - Greenough race, according to your figures was a point seven nine, wasn't it?

A I don't have it, but I trust that is what it is.

Q Now, didn't you describe that in your deposition as being a medium high correlation?

A Yes, it is.

Q As a matter of fact, it explains about sixty-two percent of the vote in terms of race, doesn't it?

A Of the difference between the groups, yes.

Q All right. Now, for the Mims election, I believe the R is a point seven one?

A Yes.

Q And that explains just about fifty percent of the vote for Mr. Mims?

A Yes.

Q Or for or against Mr. Mims in terms of race, doesn't it?

A Yes, except Mr. Mims did so well in all the wards and is really kind of meaningless in terms of politics.

Q Now, the Pearson's R for race for Mr. Langan in the '53 election was point four one and '57 it was point five two; in '61 is point seven one, which is -- all of those are

still less than what Mr. Greenough got in '71 -- '73, I mean?

A Yes. I agree with that.

Q And in '65, Mr. Langan's was point nine three and in '69 it was point nine one?

A Yes.

Q Which those were the two peaks?

A Yes.

Q Now, looking at these figures, rather than just on graph, if we just look at these figures, wouldn't we say that the Bailey - Greenough race in 1973 was more like the 1961 Langan race if we looked only at those figures?

A Yes. That is why we don't look only at those figures. It would be quite misleading.

Q So instead we look at these figures and the chart that you have given us, right?

A I think so and the voting returns.

Q Now, you went over some of the relative merits yesterday of the commission system of government.

What would you say are the relative good points of a mayor-council system of government?

A I think the relative good points are somewhat the same as Mr. Langan described when he was giving his testimony; that is, you have a centralized administrative authority and

one person, who is responsible back to the voters and you have separate legislative authority through the council, which is also responsible back to the voters. It is much easier, I believe, to pinpoint responsibility in a mayor-council system than it is in a commission form of government. I think this is some advantage.

Q Don't you get wider representation around the city?

A I assume it depends on what you mean by how it is divided and drawn.

Q Now, yesterday you were asked on direct examination about the number of white people who would be located in predominantly black wards and the number of black people that would be located in predominantly white wards and the point was made, I believe, at that time, that if there was a return to racial polarization that the white people living in predominantly black wards would be essentially unrepresented. Their votes would be diluted?

A Yes. We say that if we took it to an extreme of polarization.

Q Isn't that what is happening right now with the sixty-five thousand black people in this City that if racial polarization resumes that their vote won't count for anything?

A If there is racial polarization to that extreme,

yes, that would happen. I don't think that is the case.

For example, my legislator happens to be black and I don't think I am just disinfranchised or don't have access to him.

Q If we go to the same hypothetical you were offering yesterday?

A Oh, yes. If we go to extreme polarization between black and white, unless the black community could get into the position of playing coalition politics to influence elections very drastically, it would be a very difficult thing to anticipate. They have been able to be in that position before.

Q Now, also yesterday you gave us a list of reasons why multi-member districting might be preferential to single member districts.

Do you remember those reasons? You don't have to go over them. I want to see if you remember what you said?

A I am not sure I know what you are referring to.

Q Well, I believe you were talking about the technological problem of districting?

A I am with you.

Q Special interest groups and that sort of thing?

A Yes.

Q Are any of those peculiar to Mobile as opposed to

Q Captain, is it the policy of the planning division, as it advises the chief of police to provide adequate protection to all citizens as the resources are available?

A Yes, sir.

Q Irregardless of race?

A Yes, sir.

MR. BEDSOLE:

I have no further questions.

THE COURT:

You may cross him.

CROSS EXAMINATION

BY MR. BLACKSHER:

Captain Winstanley, you have explained to us the system you used to assign the number of patrol cars to given patrol areas and the size those patrol areas will be geographically; is that correct?

A Not necessarily the size. It is on the amount of crime in an area, not necessarily -- as I just pointed out, you can take patrol area fifteen in a predominantly black area and that would go about twenty times in thirty-nine, a predominantly white area. Therefore, size is -- we try to consider it when we can, because a car has to come from one side of his territory to another to answer a call, but the

southern water shed in the southern and southwestern part of the City of Mobile.

THE COURT:

All right.

MR. BEDSOLE:

Mr. Joyner, I believe we have got the color of green indicated completed or perhaps just started. I would like to look at the various areas using the pointer. Where is the westlawn project located?

A The westlawn project is located centrally in the City of Mobile at this point here.

Q Would that be the east of the Springdale Plaza complex?

A It would be north of Springdale Plaza.

Q Would you indicate which water shed that would feed into?

A That would feed into the Eslava Creek or Dog River water shed.

Q Where is the east Toulminville project?

A It is located in the northeast section of Mobile.

Q And I believe that you have prepared a chart which we will offer in evidence as an Exhibit, but this bid opening took place January 16, 1973?

A That is correct. It was one of the first. The westlawn and Springhill Avenue were the first projects let.

Q And the east Toulminville project affects a primarily black neighborhood; is that correct?

A Yes, sir. As far as I know.

Q And Springhill Avenue project?

A Well, it was considered an emergency project for years. There had been complaints about ambulances not being able to get in and out of Providence Hospital. That was the reason for initiating the ones on Springhill Avenue first.

Q Before we go any further, relate to us the priority that you have in your major drainage projects? By that, I think you have indicated emergency and so forth. Would you relate the hierarchy of your scheme?

A When this program first started out, it was set up and we tried to catch emergencies first and then we would catch the drains that served the greater number of people second and then individuals third. That is the way the program was started and, if I may, I would like to get into a little background about the program, with the Court's permission?

THE COURT:

All right.

help to serve the drains for the Dauphin Street thorough fare?

THE COURT:

Are you speaking of the extension?

MR. BEDSOLE:

Yes, sir.

A No, sir. I don't think you could say it would affect the Dauphin Street.

Q Moore's Creek, phase one?

A This is Moore's Creek, phase one, in an area of Kate Shepherd's School, St. Ignacious School, and .....

Q Big Stickney drainage next to Mobile Infirmary?

A This is Big Stickney here. It was necessary to put this one on in to help with the Springhill Avenue drainage problem in front of the Providence Hospital.

Q That was also on an emergency type of need?

A It was. It was outfall for Springhill drainage.

Q Texas Street area, southern drain?

A That is this drain right here in the Texas urban renewal area.

Q I am going on and on. Let us go into some of the ones that we have the plans drawn and that is indicated by the yellow, I believe, sir.

A That is correct.

with the map.

There has been some testimony in this case, Mr. Joyner, about the problems with Three Mile Creek and the fact that perhaps some of these projects that led into it will cause water to be dumped into the Three Mile Creek and won't help alleviate anything until we get the Three Mile Creek problem corrected.

Can you address yourself to the problem of the Three Mile Creek drainage?

A Well, I would certainly have to say it is a big problem. If you wanted to put it into some sort of an equation, I think you might say that Three Mile Creek is to the City of Mobile as the Mississippi River is to the United States. Sure, if you dump water into it, it is going to affect it, but Three Mile Creek has flooded in the past and I suspect that it will flood in the future and I would almost be willing to bet on it.

Q What sort of requests has the city made to various agencies for help with Three Mile Creek problem?

A Well, we have had one meeting that I recall with the Corp of Engineers about Three Mile Creek. We realize that it is a big problem and we want to do something about it, but we are talking about millions of dollars, not just something like the three or four million that we referred

to here as a typical drain in our major drainage program.

We are talking about -- I don't have a figure and I wouldn't even want to guess, but we are talking about a lot of millions of dollars to control Three Mile Creek. We approached the Corp of Engineers for some help on this and for some advice and we met in Colonel Wilson's office about a year ago. I don't remember the date, but it occurs to me it was about a year ago and, at that meeting, we asked for help. The city commission did, or Commissioner Mims, and later on we received a letter from Congressman Edwards that he would try to set funds up on it, on the oncoming budget, to help with the study, to give the corp funds to make a study of Three Mile Creek.

Q In your opinion, as an engineer, Mr. Joyner, is the Three Mile Creek drainage problem, taking the resources of the City of Mobile, is it one that the city itself can cope with?

A No, sir. I don't think so.

Q There have been discussions that perhaps a concrete culvert type of thing be placed in Three Mile Creek. Would this be feasible?

A If you are talking about the normal flows within Three Mile Creek and the water that is just between bank to bank, you could probably safely say well this would be fine

couldn't acquire the right of way there or easement.

Q Have you talked about all of the completed projects now that were built under that second priority?

A In fact, most all of them fall under the priorities of serving the biggest number of people. I don't think there would be a single one on here that would be classified as an individual. It would either have to be an emergency or a greater number of people.

Q Okay. I think you said, Mr. Joyner, that the first one that was completed was the Westlawn project?

A I don't have the dates. They all were let within the same month or two weeks apart.

Q Westlawn, east Toulminville and Springhill Avenue?

A That's right. That was in January of '73. Those were our first starts on the major drainage program.

Q. That was in 1973.

What kind of expenditures did the City of Mobile make before 1973 for drainage?

A I don't have any knowledge of how much they spent prior to that. I haven't been with the City all that long.

Q You are giving us a chronology of events, to your personal knowledge?

A Yes, sir.

MR. BLACKSHER:

Have you compiled any figures, Mr. Joyner, that would tell us how much money has been spent on drainage projects in each of the three major water sheds, broken down by water shed?

A No, sir. I don't have those figures.

Q Is there something in the record already in these Exhibits that will allow us to look at them and make that computation?

A Yes, sir. These Exhibits would reflect the amounts in relation to the plat and sums.

Q Would those Exhibits tell us each water shed the projects drain into?

A No, sir. The Exhibit won't reflect that. I think the only way you could do that would be to look at the map and see which one of the creeks it drains into.

Q Well, real quickly, just show the Court which of those projects that are already completed drain into Three Mile Creek?

A Starting at the Three Mile Creek area we have the east Toulminville drainage draining into the Three Mile Creek area. We have a drain located just south of the Mobile General Hospital that is draining into Three Mile Creek area. We have a small drain out at Carrie Drive east that

drains into the Three Mile Creek area.

Q We have two?

A Park Forrest drains -- that drains into the Three Mile Creek.

Q Is that Forrest Park or Park Forrest?

A Park Forrest, I believe. I am sorry, if I got it backwards. Then there are two drains located in the west Border Drive area in Country Club Village that drains into Three Mile Creek that are completed.

The Broad Street drainage, which is a project funded by federal, state and city, drains into Three Mile Creek. That is the only ones, at this time, that I can pick out that drains into Three Mile Creek.

Q Just for the record, now, are all the green indicated projects completed since 1973?

A Yes, sir, with one exception. I think that there is one here on South of the Mobile General Hospital that was either completed in the first part of '73 or just prior to '73.

Q Now, the problems, as I understand it, from all of this testimony with Three Mile Creek is that it serves such a wide area of Mobile west of the river?

A Yes.

Q And that a number of tributaries drain into it

and by the time you get down closer to the river in the inner areas of the city, the banks swell; am I correct?

A Any time that you increase the velocity of these drains on the side you have the water, to the river, faster than you would have a tendency.....

THE COURT:

He talking about the basic problem, as I understand it, not what steps you were taking to relieve it. He is talking about why Three Mile Creek creates the flooding conditions that it does?

A Well, the Three Mile Creek carrying the volume of water, it expands its boundaries and floods.

MR. BLACKSHER:

It is going to be very expensive, because you have to some how widen the drainage area particularly as it gets close to the river and that is why you have to call the Corp of Engineers for help.

A I am not sure widening would solve the problem.

Q My question to you is I don't understand why you would want to build all of these drainage projects that are further away from the river first, which seems to me would

tend to swell the amount of drainage that you would get closer to the river. It seems to me that you would want to work from the other end.

A We are definitely talking about some swelling. I am not sure we are talking about much more than maybe a half inch or an inch of swelling, but due to the improvements we are making .....

Q When Mr. Mims was on the stand, he was telling us that it would not be wise to pave the streets in Trinity Gardens or to build further drainage projects in Trinity Gardens until Three Mile Creek could be reinforced or fixed somehow to accept this greater drainage; is that correct?

A Well, I don't know what to say about that other than if we get to talk about the project of drainage in Trinity Gardens it is a real flat area. There is no place much for the water to go and it is our aim to try to provide some outlets for this water in the Three Mile Creek -- into Three Mile Creek from Trinity Gardens and that is the only place it can go.

Q Having consulted with the Corp of Engineers, Mr. Joyner, does the city have any proposal in mind to solving the problem of the Three Mile Creek drainage project? Your testimony is pretty pesimestic that there is

no solution.

A If you talked to hydraulic experts and all, they hate to jump to hasty conclusions about what to do to solve that problem right now. That is the reason we have asked for a study and asked help from the Corp for a study on Three Mile Creek.

We have tried to dredge it and let me bring out, if I may, Three Mile Creek starts out here at Cody Road and it is probably forty or fifty feet above sea level. Down here, close to the Mobile River area, it is at sea level.

THE COURT:

Well, now, that is the question I wanted to ask you. What is the highest sea level in the Mobile area that these water sheds affect; is it forty, the highest?

A No, sir. I live a hundred and forty feet above sea level and water off of my yard runs into Dog River. The whole western part of town here, primarily -- well, I would say from right along in here on up to here, all of this drains into Three Mile Creek, the whole northern half of the city drains into Three Mile Creek.

THE COURT:

And that runs from sea level near the Mobile River to what?

A Well, I was fixing to say from Mobile River to Staton Road is sea level and from Staton Road on up to Cody Road.....

THE COURT:

That is out close to the Providence Hospital?

A It is out past the Mobile Infirmary.

THE COURT:

It is sea level that far?

A Yes, sir. And we have to have permits to drain into that, because it is affected by the tide.

THE COURT:

All right. What is the outer most limits of the city?

A From there on out to the outer most limits -- I don't have a quad sheet or anything to refer to, but I am sure it exceeds fifty sixty feet on out to the western limits.

What I was about to say there, out here you get a lot of velocity in your stream. It picks up soil erosion off of yards and along the banks and everything and it has a tendency to deposit this silt from Stanton Road to the Mobile River. We have gone in there and dredged and in researching the records, we started dredging Three Mile Creek in 1958.

In 1958 you could take the material out of that creek and put it up on the banks and give a larger capacity, you might say, for the creek without any problem, but now days to dredge this body of water we have to have permits. People don't particularly want us to put the soil on their property and the three areas that we do have places to place spoil, when we put it up there we have to haul it off. So, we do try to keep Three Mile Creek dredged and opened up to handle all the water it can, but we have problems with that.

MR. BLACKSHER:

You say you have to get permits other than land owners'? Do you have the United States government to deal with?

A That is correct. We ask them for the permit and they take the application and circulate it. It goes through the water improvement commission, EPA and various other agencies.

MR. BLACKSHER:

Why is it, Mr. Joyner, that the city has not approached the fundamental problem of the Three Mile Creek drainage situation until 1975 when you went to the Corp of Engineers?

A Well, the Three Mile Creek area has flooded, you

know, all the way back as far as I know and all of a sudden everyone becomes conscious about trying to do something about the drainage. I think that would be in '72.

In '75 was the time in which we were approached and in which we asked for help on it.

Q You can't say what is going to happen on Three Mile Creek?

A I hope that there will be some means in which we can help control it, but I don't think that we will ever master it.

Q Just a couple of other questions here.

Among the completed drainage projects, you mentioned the Texas Street southern project in the urban renewal area?

A Yes, sir.

Q Was that financed in any part by federal funds?

A. I don't have any knowledge of how the financing was set up on the project. I understand that sometimes that they have revenue sharing involved in them, but I don't know the amounts or how much.

THE COURT:

Are you going to be with him much longer?

MR. BLACKSHER:

Just one more question.

You said that the west Toulminville drainage project, which will provide relief for Trinity Gardens is eligible for community development funds.

Why is that particular project eligible?

A When you start looking at sixty miles of drains and you are limited in funds, you start searching and looking for everybody that is willing to contribute or help out with it and these community development funds were there.

Q Are the other projects also eligible for community development funds?

A No, sir.

Q I am trying to .....

MR. BEDSOLE:

We will have a witness testify about the community development program.

MR. BLACKSHER:

You don't know the answer to the question?

A No, sir.

MR. BLACKSHER:

All right. Your Honor, I said one more and I am through.

REDIRECT EXAMINATION

BY MR. BEDSOLE:

Q Mr. Joyner, as relates to the Trinity Gardens area, is it necessary to lower any creek to drain this? Is it necessary to lower the drainage as it comes out the Trinity Gardens like a saucer?

A Well, Trinity Gardens is flat and everybody knows that if you have a flat surface like that and water gets on it and you can't get it off readily, if you will put a grade to it and give it a tilt you can carry water off from an area. That is what we are attempting to do is grade it out to Three Mile Creek.

MR. BEDSOLE:

That's all.

THE COURT:

All right. Gentlemen, be back at one-thirty-five.

(LUNCHEON RECESS)

THE COURT:

All right. Whom will you have next?

MR. BEDSOLE:

Tom Peavy.

TOM PEAVY

the witness, called on behalf of the Defendants, and after having first been duly sworn to tell the truth,

THE COURT:

Yes.

CROSS EXAMINATION

BY MR. STILL:

Q I would like to show you what has been marked, for identification, as Plaintiff's Exhibit number 111, which are documents received from the office of revenue sharing concerning the complaint issued or initiated by the N.A.A.C.P.

As you can see, the letter marked "C", to the Honorable Lambert C. Mims, is from the local branch of the N.A.A.C.P. It is a three page letter signed by Dr. Gaillaird. I call your particular attention to the document labelled in which is a memo or a memorandum to the file from Robert Murphy and several other people.

Mr. Murphy was one of the people that you met with; is that correct?

A Dr. Murphy, yes.

Q Now, among the things that you looked at during that compliance review trip here to Mobile was it Herndon Park and Gorgus Community Center that you looked at?

A I did not attend those trips with them concerning the parks. I had nothing to do with them.

Q All right. I call your attention to the statement

on page two of this memorandum which says, "Pictures of these two parks clearly show that Herndon Park, which was in the white community, is in better condition than Gorgus Community Center. Furthermore, the swimming pool in the center is not operative and is in dire need of repairs."

Is that a correct statement from this?

A I am not familiar with the condition of the parks; no, sir.

Q All right. And did not they say on page three of this memordandum that even though they found no discrimination that they recommended that there be a follow-up to see that the pools in minority areas are constructed and renovated in time to be used by the beginning of next summer?

A It was my understanding that these pools have been done, not by the next summer, but they have been done as of this date.

Q This memorandum is dated 8/31/73, I believe.

Now, the next section of the report deals with paving, resurfacing and drainage and begins on page four of the memorandum.

On page five there is the following statement, "However, it is quite evident that these areas, to a very large degree, talking about paving here, with the exception of Trinity Gardens and the Bay Bridge area are being used for

commercial and commuter traffic, such as Davis, Stanton, Donald and Summerville Streets rather than for use of citizens in more generalized residential areas."

The yellow areas noted on the map indicate that resurfacing projects have been concentrated on the main streets of the white neighborhoods. There is clear evidence that the resurfacing projects were not performed on an equitable basis of the neighborhoods.

A I would have to disagree with that.

Q You disagree with that?

A Yes, sir.

Q But if you take a look at your map, wouldn't you say that the yellow lines are primarily in the white neighborhoods?

A I seem to see yellow lines all over that map.

Q The report goes on to state, "The complainant also provided several photographs of areas which had poor drainage, such as Chisam and Persimmon Street which were caused by the dike built by the city to retain the water from the river. The city has now agreed to cut a hole in the dike so that the accumulated water can filter into the river."

The total allocation of revenue sharing funds, approximately one million one hundred and seventy-six thousand

dollars, for the installation of drainage systems has been limited to the neighborhoods of: Riverside, Beichleiu, Mertz, Maryvale, Mayesville, Rolling Acres, Jackson, Bolton and Airmont. Some of these neighborhoods are shown as areas with drainage problems, but others are indicated as having adequate drainage. All of these neighborhoods are predominantly white.

Those areas which were considered with adequate drainage were included in the revenue sharing budget, when those in the black neighborhood listed as poor drainage were not. Also, we noted that the city's capital budget shows that seven hundred thousand dollars was allocated for a drainage project along the Dog River area which is also predominantly white. We did note, however, that the City of Mobile has allocated approximately one million dollars for the drainage system along the Three Mile Creek area and the downtown section, which is predominantly black."

Did they bring that to your attention when they made the audit?

A No. I have never seen this letter.

Q Now, I call your attention finally to within this larger document, a letter labelled, at the bottom, H.H., and it is a letter dated September 23, 1974, and sent to Mayor Greenough.

Is that a copy of a letter that you have seen before?

A Yes, sir. I have seen this.

Q All right. In that they specifically request that if you will follow up on the things that they mentioned in some earlier conversation with you, then you will have demonstrated compliance with the act; is that correct?

A That is correct.

MR. STILL:

Your Honor, we offer Exhibit -- Plaintiff's Exhibit number 111.

Now, so we can understand this very clearly, normally low cost paving or curb and gutter paving is done on an assessment basis, is it not?

A That is correct.

Q And sidewalks are done on a one hundred percent basis; aren't they?

A That is correct.

Q I believe with curb and gutter streets and low cost pavement, one-third of the cost is born by the local residents?

A That's right. It makes it come out one-sixth to each property owner.

Q To each side of the street?

as to Defendant's Exhibit 60- D, which breaks the streets down by the ward groupings, why didn't you break that down reflecting which streets were paved by private developers, which was done under low cost and which were done by venture?

A I was not asked to do that, sir.

MR. MENEFEE:

Okay, sir. No further questions.

THE COURT:

You may come down.

Whom will you have next?

MR. BEDSOLE:

Just one further, Mr. Summerall, isn't this map number 60-E, does it reflect that done by the city in red, either by the venture system and that done by private developers in the green?

A Yes, sir. That's right.

Q But is it not done by ward group?

A No, sir.

Q Based on your observations as to the red and green, Mr. Summerall, has most of the work that has been done by the developers been in the western section of the city?

A Yes, sir.

MR. BLACKSHER:

Objection, your Honor. That is an observation

figure. It was, at one time, one million nine something. The second year was two million seven hundred and sixty-two thousand dollars and the third year estimate was four point six million and I think the figures will remain four point six million, at least that is the published and for the remaining three years, four point six, four point six, et cetera.

Q I will ask you this, Mr. Barnett. Taking your study -- let's say the base study, the 1966 neighborhoods of Mobile, and the up date, the 1975 housing demand and needs analysis. Your city planning commission makes studies of it and classifies houses in these various neighborhoods, does it not?

A Yes, it does.

Q Take, for example, the Trinity Gardens neighborhood. Can you give us the comparative housing standards and the numbers since 1966? I believe you have them broken down in classifications of some sort?

A Yes. The standard and depreciating and sub-standard and then we have vacant. In 1966 there were thirteen hundred and ninety-five dwelling structures in Trinity Gardens. Fifty-two of them were not occupied. Of this thirteen hundred and ninety-five, two hundred and fifty seven were listed as standard and three hundred and sixty-three

as depreciating.

This depreciating is a term we use to say that the house is not standard, but it can be fixed up and it deserves to be. It isn't a shack and it isn't that run down.

Seven hundred and twenty-three were listed as sub-standard and should be either destroyed or completely rebuilt. Fifty-two were rebuilt. In 1975 you wanted a comparison?

Q Yes, sir.

A Two hundred and fifty seven listed as standard, had risen to nine hundred and seventy-two standard structures and the depreciating number didn't change appreciably, but the standard dropped from seven twenty-three to twenty-six leaving about four hundred units in Trinity Gardens that needs some attention as opposed to one thousand units in 1966. The figures completely reversed and interestingly enough there are less houses,only thirteen hundred and sixty-four, and still about thirty-four vacant. Most of this is caused by code enforcement by the city since they started a comprehensive program in 1965 and 1966.

Q That is known as the neighborhood improvement program?

A That is just a part of it. They go out and hold

meetings also and try to encourage people to fix their homes up.

The inspection department will then go out and give the house an inspection and tell the people exactly what is wrong with it and neighborhood improvement would guide the people as to just how to get the best deal to fix the house up, give them guidance. Better Business Buearu is there. A lot of neighborhood leaders, city leaders and experts in the field to tell these people how and the best way to get their house fixed up.

Q So it would be a voluntary program?

A Yes. The only thing you might say compulsory about the whole thing is that the City did go out there and tear down and condemn most of the vacant rundown shacks.

MR. BEDSOLE:

I have no further questions.

CROSS EXAMINATION

BY MR. MENEFEE:

Q Mr. Barnett, the figures you were just giving us on the changes and housing conditions, what does that come from?

A That comes from our survey and the original figures came from our survey using the same criteria.

Q What is the original, the neighborhoods of Mobile?

A Original -- in the neighborhoods of Mobile, I combined two neighborhoods there and call it Trinity Gardens. In the neighborhoods of Mobile they are called Nelly and Summerville and you have to add the two figures together to get the thirteen ninety-five. I did that quickly, but that is approximate, very, ver close.

Q Well, the figures from your up date on the housing, that is a reflection of 1970 figures?

A 1975. I have 1970 figures. I have them. I didn't read them.

They are also listed, the 1970 figures are listed in this Exhibit on housing demands and needs analysis under Trinity Gardens, Nelly, Summerville and Trinity Gardens.

MR. BEDSOLE:

Defendant's Exhibit number 90.

A The 1970 figures. Now, you would have to add these figures, because Trinity Gardens is actually two neighborhoods. It is called Nelly and Summerville in that publication.

For instance, in the Nelly neighborhood, which is everything north of the railroad that cuts through the middle section of Trinity Gardens, the figure had jumped from

one hundred and ninety-two standard to four hundred and eighty-seven standard and then to six hundred and seven standard in 1975, just for that portion, and the depreciating had jumped from two hundred and seventy-two in '66 to three hundred and sixteen in 1970, to three hundred and twenty-six in 1975 and the number of substandards had fallen from five hundred and forty to two hundred and seven, in 1970 to twelve in 1975.

Now, that is just a portion of Trinity Gardens. The others are in the Summerville neighborhood. It had standard which jumped from sixty-five standard to two hundred and forty-one in 1970 to three hundred and twenty-six in 1975. The depreciating numbers changed this way, ninety-one in 1966 and it dropped to eighty-two in 1970 and it dropped to forty-six in 1975. The sub-standard changed from one hundred and eighty-three sub-standard in 1966 to ninety-three in 1970 down to sixteen in 1975.

The figures that are missing from there, that doesn't add up to the thirteen ninety-five is the number of vacant. I think that is about thirty or something like that. So, they are in that -- whatever that housing demand and needs analysis is.

Q Is this a consistent result thatyou have achieved throughout the black neighborhoods in the city?

A Not that dramatic in most of the other areas, but it is very consistent with the city as a whole.

Dramatic results have been achieved in the city through code enforcement as evidenced by publications from HUD, "Challenge", a report put out by Mr. Papageorge in the HUD, complimenting on the success of code enforcement in the City of Mobile, citing it as one of the best in the nation. He cited figures in there in 1962 using census figures. I think they extended from sixty -- there were nineteen thousand sub-standard units listed in the City of Mobile. In his report he said they had come in and encouraged the city to start enforcing the codes and so forth and not be re-certified in its program.

Since that time, he made a survey and found that by 1970 those figures had dramatically dropped to less than three thousand sub-standard and depreciating homes. He counted the ones that were brought in compliance.

We now estimate that figure is sixty-five hundred. He didn't count the ones going bad, but that is a city wide -- that is a reduction of thirteen thousand from a high of nineteen thousand.

Q This article you referred to is in the back?

A It is in the back of the housing demands and needs analysis.

Q Could we turn to that, please, sir?

A Yes, sir. It is George Papageorge, yes. Here is the big drop, nineteen down to that.

Q Yes, sir.

A And he attributes it to strong code enforcement.

Q I am reading from the first page of the article. It says, "Federal statutory requirements were a major factor in bringing about a change"?

A That is the requirements that we enforce our codes.

Q The Federal government requires that these codes be enforced?

A You are required in re-certification of your workable program, back in those days, to have codes or you weren't eligible to receive urban renewal money. The reason for that, the Federal government didn't want cities to have money that were allowing housing to go bad. They insisted that each year and then it changed to eighteen months that the city certify its workable program. That is a term where you go plead your case and say look, we have done our job, enforced our codes, and now this should make us eligible with urban renewal and it did. We never have lost our certification.

Q The community development program has a rather

Mr. Walsh about the budgeting process for the city that the '75 budget did not reflect revenues from the community development funds?

A Well, I couldn't swear -- I know that this is -- we just got our new one approved. We have sent in two.

You do one a year. I may have my math wrong, maybe '75 and '76. Yes, I think that's right, and the third year will start in '77.

Q In your neighborhoods of Mobile and again in your updated study, your housing.....

A It is the housing study.

Q The housing study, you went through the neighborhoods and repeated the -- to a substantial extent, re-identified those areas which were the most blighted; is that correct?

A That is correct.

Q One criteria was indices of social blight and another indices of physical blight; is that correct?

A Right.

Q Would it be fair to say that there is a high correlation between indices of social blight and the blackness of the neighborhood, racial composition?

A To a large degree, yes. That was pointed out in the original study. We did not redo all of the original in this.

This was more or less housing, but if you will look

-- if you would graph all of those things they would be predominantly in those areas social problems as well as housing problems. They overlay over each other.

Q Would that also be true for indices of physical blight?

A That is correct.

Q This neighborhood of Mobile study, which I understand is based on some data from 1966, but was finally put together and published in 1969, is the most comprehensive analysis your department has undertaken in recent years; is that a fair assessment?

A Well, I like this new housing study for what it is. It is much more comprehensive. We didn't do the land use in here, but describing the problems in the neighborhoods. I think this new housing demands is more complete.

Q But more limited?

A Yes, more limited. It is dealing with housing. We did, as you mentioned, show overcrowding, got into the concentration of how many people lived in the black neighborhoods, where they are, and we found, for instance, ninety-five percent of the blacks live in about fifteen neighborhoods and that almost every one of those were the same as the seventeen or eighteen most blighted neighborhoods.

Q So, it was almost a perfect correlation between the

most blighted neighborhoods and the black neighborhoods?

A Yes. I think that is what the study points out. That is why we picked the seventeen neighborhoods in there.

MR. MENEFEE:

No further questions, your Honor.

THE COURT:

You mentioned in the housing needs study -- did you say sixteen thousand persons or sixteen thousand families that could not buy or rent?

A Families. That is based on their income and the average cost of a new home.

THE COURT:

When you say rent, is that with reference to any type of housing, including private?

A This is in the private sector. It does include all of the people that are in public housing, because they autbmatically couldn't afford to rent.

THE COURT:

Well, the term "rent", you apply that as to the private sector, because public housing is a subsidizing form of housing?

A Well, I have better clear that up. For instance, when you take the thirteen thousand figure .....

THE COURT:

step over here and I will ask you a few questions and you can retake the stand for some other questions, please, sir. Take the pointer and stand over there so the Judge can see.

Would you explain to the Court the various recreation districts of the city.

A We have here district one which is basically the northern part of the city. This includes the Toulminville area, Plateau. It is the area that is one hundred percent black in its composition of playgrounds and neighborhoods that we serve. It goes out -- it also includes the Trinity Gardens area and -- well, it does come down to Sage and Dauphin, but basically it is the area that we refer to as district one.

Q Let me interrupt you just one moment, please, Mr. Calametti. This is map number 2-D, which has been admitted in evidence previously with Mr. Greenough's testimony.

You may continue, then, with the various districts, please, sir.

A District number two is basically the southern district that we have. It extends down Dauphin Island Parkway. It serves both sides, of course, of Dauphin Island Parkway, and does include these facilities at Taylor Park, which is Baltimore, the Crawford Park area and the areas around

step over here and I will ask you a few questions and you can retake the stand for some other questions, please, sir. Take the pointer and stand over there so the Judge can see.

Would you explain to the Court the various recreation districts of the city.

A We have here district one which is basically the northern part of the city. This includes the Toulminville area, Plateau. It is the area that is one hundred percent black in its composition of playgrounds and neighborhoods that we serve. It goes out -- it also includes the Trinity Gardens area and -- well, it does come down to Sage and Dauphin, but basically it is the area that we refer to as district one.

Q Let me interrupe you just one moment, please, Mr. Calametti. This is map number 2-D, which has been admitted in evidence previously with Mr. Greenough's testimony.

You may continue, then, with the various districts, please, sir.

A District number two is basically the southern district that we have. It extends down Dauphin Island Parkway. It serves both sides, of course, of Dauphin Island Parkway, and does include these facilities at Taylor Park, which is Baltimore, the Crawford Park area and the areas around

Government Street out around the loop area, the area around Duval Street and in that particular section of the city.

District three, this is the western section of Mobile and this is the section west of I-65. It is a very large district in area, although we do not have too many centers out there. This is the area serving the municipal park or Langan Park area, Cottage Hill, Springhill and over into the area off of the western section of Moffat Road out that way. That is three sections of the city, at this time.

Q If the clerk would hand me, please, Exhibit 62-A, a Defendant's Exhibit.

You can retake the stand, please, Mr. Calametti. Your Honor, Exhibit 62-A was previously introduced when Mr. Greenough was testifying. It has the various recreation centers and parks broken down by Dr. Voyles's groups and by various wards.

Mr. Calametti, do you have a copy of Exhibit 62-A?

A Yes, sir.

Q I will ask you, briefly, Mr. Calametti, in district one, which is the northern part of the city, did you compile some figures as to the number of facilities, the number of personnel and the payroll expenditures?

A In district one, yes.

Government Street out around the loop area, the area around Duval Street and in that particular section of the city.

District three, this is the western section of Mobile and this is the section west of I-65. It is a very large district in area, although we do not have too many centers out there. This is the area serving the municipal park or Langan Park area, Cottage Hill, Springhill and over into the area off of the western section of Moffat Road out that way. That is three sections of the city, at this time.

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A Yes, sir.

Q I will ask you, briefly, Mr. Calametti, in district one, which is the northern part of the city, did you compile some figures as to the number of facilities, the number of personnel and the payroll expenditures?

A In district one, yes.

Q Let me ask you this, Mr. Calametti, did you do so at my request yesterday?

A Yes.

Q The number of facilities that -- now, let's make a distinction, please, sir. You are the recreation director; is that correct?

A Right.

Q You are not the parks' director?

A No. You have a separate parks department.

Q All right. Would you please, then, outline.....

THE COURT:

Tell me the difference.

MR. BEDSOLE:

That is what I am trying to do, please, sir.

What is the difference, Mr. Calametti, between the recreation director and the parks department?

A Basically, the recreation department is responsible for the programming on the parks and in the centers. The parks department is responsible for the physical facilities, the maintenance, upkeep and that sort of thing.

THE COURT:

Just a minute.

MR. BEDSOLE:

Mr. Calametti, at my request, did you compile some

figures as to the number of personnel you have working under you and the number of facilities that the recreation department is involved in, in the various districts?

A Yes.

Q Please, sir, in district number one, how many facilities do you have under your supervision?

A Eleven.

Q That is involved in a recreation program of some sort?

A That's right.

Q How many full time personnel do you have employed?

A Well, we have sixty-six personnel in that area.

Q In that area; is that correct? Well, you said eleven a minute ago. What do you mean by eleven and now sixty-six?

A Eleven facilities, your Honor, and sixty-six persons.

THE COURT:

Fine.

MR. BEDSOLE:

So, you have eleven areas where you are operating and then you have sixty-six full time personnel working for you?

A They will be full time and part time, counsellor, some would be part time.

Q Part time would include an individual that might come after school?

A Yes. The athletic program is basically after school from three-thirty to six-thirty and some of the centers are open until ten o'clock at night and we have some people say working from seven to ten.

Q In district two, how many centers are involved in the recreational program?

A Ten.

Q Mr. Calametti, is this in the southern area of the city?

A District two, yes.

THE COURT:

One is really the northeast and district two is the southeast?

A Yes.

MR. BEDSOLE:

In district three, which is the western section west of Interstate.....

THE COURT:

You didn't get the number of persons in two.

MR. BEDSOLE:

How many personnel do you have under your direction in district two?

A Fifty-five.

Q All right, sir. District three, Mr. Calametti, which is basically, I believe, west of I-65;is that correct?

A Yes.

Q The number of facilities that are involved in the recreation program are what?

A Six.

Q How many people do you have working under you in district three?

A About thirty-five.

Q All right. I believe that you have made some percentage figures on some of these for us at my request, did you not?

A Yes, sir.

Q Looking back at district one where we have eleven facilities, percentage of the total number of facilities involved in the recreation program, what is the percentage of the facilities in district one, please, sir?

A Forty-one percent.

Q And the number of personnel in district one out of all the personnel that you have working in all three districts, what is that percentage?

A Forty-two point three.

Q I believe you have taken your records, Mr. Calametti,

and compiled some payroll expenditures for me; is that correct?

A Yes, sir.

Q Now, in district number one, which is the northeast part of the town, what have been your payroll expenditures over what period of time, Mr. Calametti?

A That would be 1974-'75. The figure that we have here is a hundred and ninety-seven thousand six hundred and fifty dollars.

Q All right, sir.

A That is about forty-two percent.

Q Forty-two percent?

A Yes.

Q District two, what were your payroll expenditures in the year 1974-'75?

A A hundred and sixty-one thousand five hundred and ten dollars.

Q And in what percentage of that is the total?

A About thirty-four point four.

Q In district three, the western section of town, Mr. Calametti, what was your payroll expenditure in that area?

A A hundred and ten thousand eight hundred and forty dollars.

Q What was the percentage of that?

A Twenty-three point six.

Q All right, sir. Let me ask you this, Mr. Calametti. Did you compile any figures as to your year around staff, total number, please, sir?

A Yes. This is full time?

Q Yes, sir.

A Full time and then part time, eighty-three.

Q All right, sir. Is that full time or part time?

A That is both.

Q Mr. Calametti, I believe you have related to me the basic use by school children or youngsters -- of course, there are some older people, adults, that use the recreational facilities, but basically where is the greatest use of the recreational facilities, in what district?

A One.

Q And have you been out and visited those various recreational facilities?

A Yes.

Q Would the population or the school children or people that use the recreational facility, what is their racial make-up of district one, in your opinion, as you observed the program?

A It is very heavily predominantly black.

Q What sort of generally -- what sort of programs do you provide at your recreational facilities?

A Well, during the winter, it would be -- they have play school programs, basically in the morning, when school is in session. They have various programs for the housewives or the adults who are available at that time of day.

In the afternoon, before school is out, after lunch, then you have other programs for adults or young adults who are available to take part, at that time of day, and from three-thirty and on when the school is out, then the program is, of course, geared for the children between then and seven o'clock at night.

Athletic programs, arts and crafts, music, games, little tournaments, almost any type of activity they prefer to have.

THE COURT:

Let's take a ten minute break.

(RECESS)

THE COURT:

All right. You may continue.

MR. BEDSOLE:

Mr. Calametti, in order to clear up a matter, the figures that you gave me earlier divided by districts, do those figures of personnel include people that might be

employed in the summertime?

A Yes. Those were from 1974 - '75. We have a very large number of people that come to work in the summer only.

Q Would that be high school students?

A That could be, and could be a lot of teachers and coaches.

THE COURT:

Would that be included in the original figures?

A Yes, sir.

THE COURT:

All right.

MR. BEDSOLE:

Mr. Calametti, where are, primarily, the facilities -- I guess we would call them indoor facilities or gymnasiums, where are those primarily located?

A The city has gymnasiums at the playground facilities in the Roger Williams housing project.

Q In what district is that located, Mr. Calametti?

A That is in district one.

Q All right.

A They have gyms at the Josephine Allen housing project, which is also in district one. They have one at Lesley Busky Center, which is also in district one.

They have a gym at the Joe Radford Thomas center,

which is on Davis Avenue, which is in district one. We have a gymnasium at the Springhill Avenue recreational center on Springhill Avenue, which is also in District one. We have a gym at the Taylor- Plaza center on Michigan Avenue which is in district two.

Q Let me ask you this, Mr. Calametti, to interrupt you a moment. All of these gym facilities, in your opinion, as a recreational director, what race primarily uses those gymnasium facilities?

A Primarily the blacks.

Q You may continue.

A We have another gym at the Harmon recreational center in Maysville, which is also in district two.

Q Is that predominantly black?

A Yes. Those are the only gyms that the city operates.

Q Where are the swimming pool facilities located, Mr. Calametti, and in what district and, if you can indicate, based on your experience as a recreational director, which race primarily uses those pools?

A Well, we have a pool at Taylor Park, which is on Baltimore Street and that is in district two. That is predominantly black and there are some whites that use that pool.

We have a pool at the Kidd Playground which is in Plateau, Alabama, and that is predominantly black. We have a pool at the Joe Radford Thomas center on Davis Avenue and that is very predominantly black and we have a pool at the Gorgus playground in Toulminville, which is in a predominantly black neighborhood, yes.

Q Mr. Calametti, do you have supervisory personnel....

THE COURT:

Is that all the pools in the city?

A Yes, sir.

THE COURT:

So, all the pools are in black neighborhoods?

A Yes, sir.

MR. BEDSOLE:

Mr. Calametti, then all the pools, publicly operated under your recreation department and all the gymnasiums are in predominantly black neighborhoods; is that correct?

A Yes.

MR. BEDSOLE:

I have no further questions.

THE COURT:

You may cross him.

to give you an opportunity to point out everything and then some things I want to see.

MR. ARENDALL:

Yes, sir. We will make the arrangements.

THE COURT:

Now, I am sure, with reference to remarks that I have heretofore made, I am sure that you think you heard and think you understood what I said, but I am not always sure that you understood what I meant by what I said. Let me state that I have not come to any conclusion in this case and I make that statement particularly in the light of the next statement I am going to make.

This case was filed in May of last year. I beg your pardon, June 9th of last year. I have stated that I wanted to decide this case together with the county and board of education -- the County Commission and try to come out at the same time. In the event, and I emphasize again, I have not come to a conclusion, but I am concerned about time schedules and about time consumed. In the event that I should decide for the Plaintiffs, it will be nothing but fair to give the Defendants an opportunity to present some plan, as I required by the pre-trial order of the Plaintiffs to give and so I would like for the city to have prepared, at the time that arguments are made and I would like for them to be

furnished not less than two weeks ahead of that time -- I don't have my diary. I believe it is about the 13th of September that the County case is set. Then we will say that by the 1st of September, Labor Day, comes on the 6th of September, by the 1st of September I would like for the Court to be furnished the City plan or alternate plans and furnish it to council for the other side.

MR. STILL:

Your Honor, also, if we could present an additional plan. As you noticed our plans follow census districts, I think, in the intervening plan.

THE COURT:

You may do so, but don't inundate me with too many.

MR. ARENDALL:

Are those plans to be restricted to a division of the city or also, for example, to prescribe the suggested powers of somebody?

THE COURT:

That is a good question. As I understand it, under state statutory provisions, the alternative power in the statute, the code section as presented in the last part of yours, that the city can change its own form of government, isn't that correct, and go to certain mayor aldernman plans

and so forth?

MR. STILL:

Yes, sir. There are certain forms established.

THE COURT:

I understand those statutory plans have been referred to as a weak mayor council plan. There has been quite a bit of testimony as to the undesirability, almost overwhelming testimony or almost uncontradicted testimony and what concerns me is the details, how much detail we are going to get in. I would say, yes. I would like to have some powers, but I would like for us to somewhat follow the wisdom of the founding fathers with reference to our constitution as contrasted to the 1901 constitution of Alabama, which is so long.

But, with reference to what has been determined a weak mayor council plan and a strong mayor council plan and, don't get into too much detail, yes. I would like for that. I am going to set up schedules for plans for both parties before trial date in September. Why don't you do this, let's keep the dates -- I like to keep everybody under the gun and then it gives me time. If you need a little more time to come back and explain, okay.

MR. ARENDALL:

We will do our best to have it by September 1st.

Does your Honor what any supplemental briefs?

THE COURT:

I will leave that up to you gentlemen. They have been well briefed and I have studied your brief. If you want to, I am not going to require it.

You both have extensively briefed it and very ably and since I say that to both of you, I don't want you to say -- if I ever received a learned trial judge, I knew I was reversed, so I don't say that in that sense. I think it has been exhaustively briefed.

If you want to add supplemental briefs, y'all can exchange briefs and get those in by the 1st of September.

MR. STILL:

Yes, sir.

THE COURT:

Any other questions you have to ask me?

MR. STILL:

No, sir. I don't believe so.

MR. ARENDALL:

You want us to meet at your office with a lawyer and an expert and a van?

THE COURT:

Yes. All right, gentlemen, thank you.

Plaintiffs Exhibit 5

VOTER REGISTRATION
MOBILE - 1973

PREDOMINATELY BLACK WARDS

WARD	% BLACK V A P	V A P	REGISTERED VOTERS AS OF JULY 9, 1973
1	95.3%	1878	963
2	95.2%	4639	2876
3	95.9%	6679	4558
10	99.5%	6285	4192
20	96.0%	1817	1251
22	94.7%	1771	1152
32	99.9%	2883	1478
Totals 7 Black Wards		2,5952 % Black Registered Voters 63.4%	16,470
PREDOMINATELY WHITE WARDS			
4	.2%	2742	2720
6	2.1%	5685	5035
15	2.1%	3893	3324
16	.09%	2167	2077
17	.00%	4846	4465
18	2.1%	6342	6363
35	.4%	2915	2336
36	.08%	5362	3140
37	.6%	4058	3140
Totals 9 White Wards		38,010 % White Registered Voters 89.6%	34,086

PLAINTIFFS EXHIBIT 6

VOTER REGISTRATION
MOBILE COUNTY - 1976

PREDOMINATELY BLACK WARDS

WARDS	% Black	POPULATION	REGISTERED VOTERS MARCH 23, 1976
33-91-1	91%	12,709	5,584
33-99-2	95.4%	8,664	3,149
33-99-3	90.6%	4,510	1,808
33-99-4	99.7%	5,536	1,712
35-103-1	99.5%	8,946	2,784
Totals 5 Wards		40,365	15,037

% Black Registered Voters 37.14%

PREDOMINATELY WHITE WARDS

34-100-4	0.6%	7,760	4,431
34-101-1	0.7%	7,310	3,807
34-101-2	2.6%	4,196	4,177
34-101-3	0.4%	5,520	4,141
34-102-3	1.0%	4,244	2,831
34-102-4	0.3%	2,704	2,052
34-102-5	0.0%	6,914	4,460
35-104-4	0.8%	6,029	3,330
Totals 8 Wards		44,677	29,229

% White Registered Voters 65.18%

Sources: % Black - computed from census data by Anthony Parker.
Population - computed from census data by J.E. Voyles.
Registered Voters - taken from official Board of Registrars records.

Plaintiffs Exhibit 7

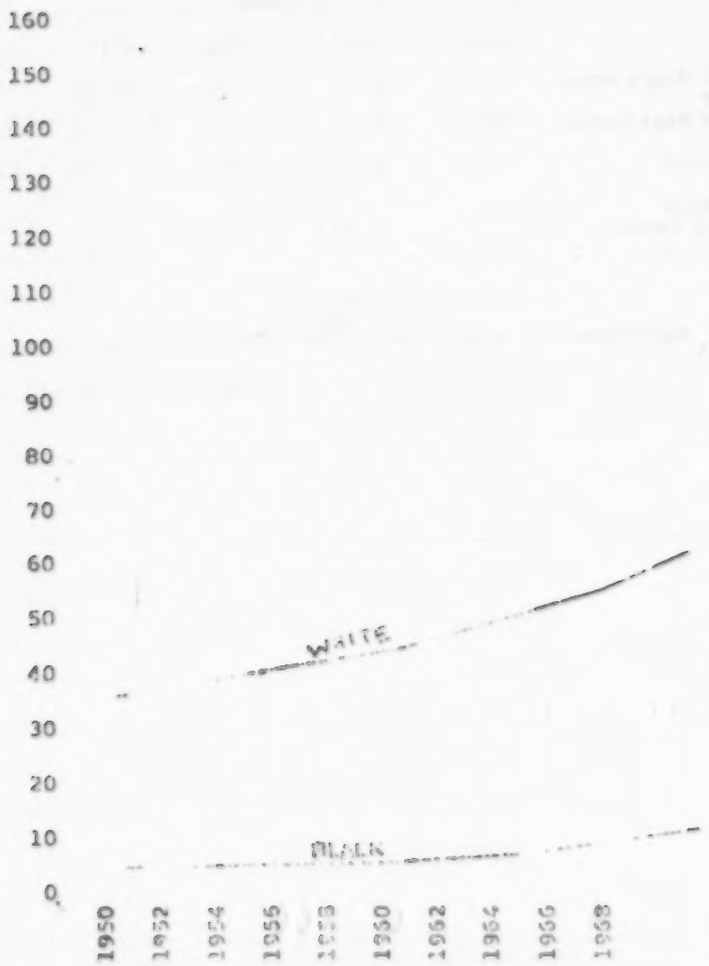
VOTER REGISTRATION - MOBILE COUNTY

	-Years-				
	1956	1966	1968	1973	1976[1]
% White Registered		88.4%	94%	89.6%	62.2%
% Black Registered	14%	48.8%	64%	63.4%	36.5%
Difference		39.6%	30%	26.2%	25.7%
Difference State at Large		36.9%	25.8%		

1/ As a percentage of population rather than voting age population (VAP).

CHART I

VOTER REGISTRATION IN MOBILE, ALABAMA



Source: Board of Registrars, Mobile County, Official List of Voters, 1953-1970.

The attitude in Mobile County toward Negro suffrage has been less restrictive than in some other areas of Alabama, such as many black belt counties where few, if any, Negroes were registered prior to 1965. An assessment of a Negro's freedom to register in Mobile is difficult, but it is probably safe to speculate that, at least since 1965, Negroes have been able to register and vote in Mobile with a minimum of difficulty.

The latest reliable figures on registration by race are those of 1964, since race is not designated on registration forms after that year. Any projection from 1964 to date is difficult; the Justice Department estimates are by state only and are not broken down by county. Luckily, the Southern Regional Council in Atlanta does publish registration figures by race and by county.[5] Using these figures and census data projections from the Southern Regional Planning Commission, it is possible to project reliable figures on Mobile registration by race and by ward. These are presented in Table I (page 48) and are reflected in Chart I (page 37), which shows the growth of Negro registration in Mobile from 1948 to the present.

Registration is but one side of the coin. To register is only part of the action of voting, and data reveals that Negroes do not exercise the right to vote in as high a percentage as do whites in Mobile. For example, in the 1968 presidential election, a great deal of effort was made to get Negroes to the polls, in an idealistic hope of preventing

Wallace, at least, from receiving a majority in Alabama. In Mobile County, the turnout for Humphrey in the black wards was sizeable, as will be discussed in a later section of this paper, but the falloff between the vote for president and the vote for congressman was significant, as is indicated by Figure I. The falloff is even more extraordinary when one considers that Nobel Bensley, a Negro, was a candidate for Congress on the National Democratic Party of Alabama ticket.

FIGURE I

Negro Voter Turnout
1968 Presidential and Congressional Races

	Total Registered	Presidential Vote	Congressional Vote
Ward 1	729	492	163
Ward 10	3453	2383	751
Ward 31	578	505	354
Ward 32	1048	745	236

Source: Official Canvas, Tabulation and Declaration of Presidential and Congressional Races Held in Mobile County, Alabama, 1968.

H. D. Price observed the phenomenon of "falloff" in black voting across the South, and he suggested some explanations for its occurrence:

> Many whites vote at least partly because they regard it as a duty and as part of being a good citizen. Once at the polls, they usually take the trouble to indicate a choice in most of the contests on the ballot. Negroes, however, have not been subjected to decades of civic exhortation on the virtues of voting per se. In fact, their very right of participating in elections at all is still politically controversial even though legally settled. As a result, most Negro voters go to the polls only when there is a contest that presents a choice of direct meaning to them. And once in the voting booth, Negro registrants are still quite likely to indicate a choice only in the contest or contests that have particular interest to them.[6]

Price's observations seem to be valid in Mobile, and certainly falloff and poor turnout dilutes black voting power.

The 1967 tax proposition referendum is another example of the relatively poor turnout in black wards when elections of minor attention are held. In the fall of 1967, a tax proposition was placed before the citizens of Mobile County to establish a temporary additional property tax to support

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[6] H. D. Price, The Negro and Southern Politics (New York, 1957), p. 77.

the S.T.A.N.D. organization is still alive and well in Mobile, prospering on attention accrued in its stand against Lusing. As this is being written, Westbrook has again filed to run for a seat on the school board.

Also in 1969, the Republican party felt strong enough to demand representation in the county's legislative delegation. A local attorney, Bert Nettles, filed for one of two vacant seats in a special 1969 legislative contest. The Democratic party in the county had a candidate who was supported by George C. Wallace, Sage Lyons, whom they wanted elected at any cost. Since two black candidates were filing--one for each seat--it was feared that a head-on confrontation between Nettles and Lyons would result in a plurality for a black in one of the elections. Thus an agreement was reached: Lyons would run for one place; Nettles for the other. In return, the Democratic County Committee agreed that Nettles would face no strong opposition in his contest. Since this was a special election, the Democratic County Committee certified the Democratic candidates without primary elections and could keep their promise not to run a candidate against the Republican, Bert Nettles. This arrangement, however, could not have been made had not

a sizeable number of the County Democratic Executive Committee supported Nettles. Thus, the election of both Nettles and Lyons was insured.

The voting fell into racial divisions, with Montgomery and Bell receiving majorities in each of the black wards. It will be noted, however, that Bell ran considerably behind Montgomery in each of the black regions, indicating the strength of Beasley's opposition to his candidacy. Lyons ran well ahead of Nettles in the race, showing especially his strength in the lower-middle income white wards. But, both Lyons and Nettles did quite well in all areas of the city except the black regions, proving it possible for a Republican to win a seat in the Alabama legislature, a feat deemed impossible until after 1969.[9]

This examination of voting in Mobile reveals that the turnout patterns here follow socioeconomic lines in about the same manner as studies in other areas have revealed. Using Scammon's words, "the unblack, the unpoor, and the unyoung," [10]

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[9] Ibid.

[10] Richard M. Scammon and Ben J. Wittenberg, The Real [illegible] (New York, 1970), pp. 45-61.

The Pearson computation again reveals the racial implication of the voting. A coefficient of -.92 indicates an almost perfect negative correlation of the number of Negroes in a ward and the vote for Wallace. The economic breakdown is peripherally high at -.43, indicating that Wallace did better in the upper-income areas than in the poorer wards. This is, however, misleading. When the black wards are removed from consideration, a truer picture is presented. A coefficient of .84 is computed, showing that, in the white wards, Wallace did better in the lower-income areas than in the more affluent districts. This is no doubt a reflection of the traditional loyalty of the white middle-class to the Republican party. In any event, Wallace so overwhelmed his opposition in Mobile that the scattered vote for Humphrey and Nixon is virtually meaningless, except in the Negro wards, where Humphrey did very well.

Presidential elections in Mobile have gone in the same direction as have other elections: race has emerged as the greatest issue. To better dramatize that proposition, a closer look will be given to two hypotheses:

1. Negroes have declined in political power in Mobile since the 1960's.

2. An alliance of the "have-nots" against the "haves" has not resulted from larger Negro registration, as V. O. Key suggested might occur.

Figure XVII presents a percentage comparison of the vote in the Mobile elections discussed above, arranged to test the above hypotheses. The percentage difference between votes cast for the winning candidates in the lower-income black wards and the lower-income white wards is indicated. Likewise, this statistic is used to compare the votes cast in the low-middle income black and white wards (groups three and four). Since the income of these groups is relatively the same, a high percentage difference will show a voter choice made on the basis of race, rather than economics.

Hypothesis two is difficult to test, since the relationship between racial composition of the wards and economic level of the area is so closely aligned in Mobile. Figure XVIII, however, presents a comparison of vote between the lower-income white wards and the higher-income white wards. By eliminating black wards from consideration, the influence of race as a factor in the comparison is held at a minimum. The statistics presented in Figure XVII support [illegible] that black electoral strength has decreased

FIGURE XVII

Comparison of Black/White Voting in Selected Economic Groups

Election		Percentages of Winners					
ity Commission		Low Black	Low White	Diff.	Low-Mid Black	Low-Mid White	Diff.
953	Finance	57.63	53.30	4.33	47.50	48.67	1.17
	Works	73.73	68.30	5.43	60.10	67.37	7.37
	Police	57.93	59.10	1.17	53.30		
957	Finance	81.50	54.31	27.19	58.24	51.46	6.78
	Works	83.41	64.38	19.03	75.22	65.64	9.58
	Police	77.54	53.31	25.23	52.16	84.69	32.73
961	Finance	94.31	46.41	47.90	91.30	50.94	40.36
	Works	16.22	46.04	29.82	22.51	55.67	33.16
	Police	14.21	46.56	32.35	31.44	53.26	21.86
965	Finance	89.01	43.29	45.72	87.48	46.73	40.75
	Works	32.11	49.75	17.64	19.30	51.02	31.72
	Police	28.83	82.60	53.77	27.00	78.90	51.90
969	Finance	11.25	53.63	42.38	5.61	65.65	60.04
	Works	34.18	56.91	22.73	19.11	54.12	35.01
	Police	31.38	87.15	55.77	28.17	81.40	53.23
Gubernatorial							
954		97.39	83.58	3.81	82.19	79.82	2.37
958		14.61	45.70	28.09	37.15	54.21	17.04
962		13.51	43.90	30.39	46.00	52.81	6.81
966		9.04	61.05	52.01	5.71	54.14	47.42
970		7.41	85.31	78.90	1.04	73.08	72.04

583

694

120

FIGURE XVII (continued)

Electio:	Percentages of Winners					
Presidential	Low Black	Low White	Diff.	Low-Mid Black	Low-Mid White	Diff.
1948	80.96	78.60	2.36	80.50	78.42	2.08
1952	43.74	49.00	5.26	39.40	55.18	15.78
1956	45.73	51.10	5.37	42.20	58.37	15.17
1960	73.26	67.15	6.11	58.90	53.27	5.63
1964	9.31	84.60	75.29	1.01	75.91	74.90
1968	8.10	85.80	77.70	1.13	74.90	73.77

695

Source: Probate Court Records

584

121

since the 1950's. The observation is clear: with the exception of city commissioner Joseph Langan, no candidate who has won a majority in the black wards of Mobile has also carried a majority in the entire city since 1960. As the Figure indicates, before 1960, the difference between black and white voter choice is not greatly significant in most races when economic level is held constant. While the black vote was disproportionately small compared to the number of Negroes residing in Mobile, their votes were often important enough to be sought. Since 1960, this has not been true; identification with the black wards is the "kiss of death" for an office-seeker in Mobile. The black voters constitute such a visible and emotional issue to Mobile's white voters that any identification with blacks in Mobile will produce a reaction by white voters and defeat the black-supported candidate. Thus, while the numbers of blacks voting has increased, the relative importance of the black vote is less than before the civil rights movement of the 1960's.

Race is perhaps the reason that there is little deviation in voting by whites regardless of economic level in the [illegible] figure will present a comparison of the vote between the lowest income and the highest income white

FIGURE XVIII

Comparison of Low/High Income White Wards in Mobile Voting

Election	Percentages of Winners		
City Commission	Low White	High White	Diff.
1953 Place One (Finance)	53.30	52.40	.90
Place Two (Works)	68.30	65.80	2.50
Place Three (Police)	59.10	53.15	5.95
1957 Place One	54.31	51.13	3.18
Place Two	64.38	66.83	2.45
Place Three	52.31	33.41	18.90
1961 Place One	46.41	51.62	5.21
Place Two	46.04	63.14	17.10
Place Three	46.56	61.75	15.12
1965 Place One	43.29	44.63	1.34
Place Two	49.75	54.70	4.95
Place Three	82.60	78.86	3.74
1969 Place One	53.63	50.78	2.85
Place Two	56.91	56.90	.01
Place Three	87.15	74.13	13.02
Gubernatorial			
1954	83.58	77.84	5.74

FIGURE XVIII (continued)

Election	Percentages of Winners		
Gubernatorial	Low White	High White	Diff.
1958	45.70	59.12	13.42
1962	43.90	40.90	3.00
1966	61.05	52.11	8.94
1970	86.31	68.98	17.33
Presidential			
1948	78.60	75.25	3.35
1952	49.00	53.40	4.40
1956	51.10	55.60	4.50
1960	67.15	39.06	28.09
1964	84.60	73.14	11.46
1968	85.80	67.16	18.64

Source: Probate Court Records

wards. The figures presented here indicate that there is no major difference in voting patterns between low and high income white areas in Mobile.

Except for the 1957 and 1961 city commission races for Place Three (Public Works Commissioner), and the 1964 Place Two (Police Commissioner) race, there have been no major differences in voting between the groups in city commission races. Both of these races involved Commissioner Hackmeyer, who, as previously mentioned, attempted a low-income black and low-income white alliance. He was successful, as figures indicate, in gaining support from this alliance, but it did not produce enough votes to keep him in office after the 1957-1961 term.

The 1961 Police Commissioner race (Place Two) also shows some variation between groups (17.10 percent). This can most likely be explained by the candidacy of McNally, a Republican, who drew disproportionate strength from the traditional Republican areas--the upper-income wards. After 1961, the local elections show no major difference in white wards of high or low income. This indicates that the choice of voters was determined by something other than economics.

The gubernatorial and presidential contests show little difference in economic level after 1960. True, the Democratic ticket in 1960 (Kennedy) and in 1968 (Wallace) did fare better in the low-income white wards than in the upper-income white areas, but this can be explained by the traditional support for the Republican presidential candidate in these areas. The 17.33 percent difference in the 1970 gubernatorial primary is due probably to the Wallace appeal to race, which had more support in the low-income areas than in the high. But, even in the upper-income areas, Wallace won a landslide 68.98 percent of the popular vote.

Thus, this examination of the vote reveals that an alliance of the "have-nots," cutting across racial lines, against the "haves" has not materialized in Mobile, nor is one likely. Likewise, the position of the black vote in Mobile is becoming more and more tenuous. Presently, identification with the black vote spells defeat for any candidate in Mobile. In practical terms, this means that blacks have less influence than they had before the 1960's, and that candidates for office are able to ignore black interests and still be elected. It is ironic that the

civil rights movement--which intended to increase black political power in the South--has had the reverse effect in Mobile.

Plaintiffs Exhibit 33

CITY COMMISSION

includes these tests

Voyles Pearsons r

1953	1. Langan	2. Luscher Sr.	3. Hacknayer
Income	.38	.52	.41
Race	.41	.69	.34
1957	1. Langan	2. Luscher Sr.	3. Hacknayer
Income	.64	.89	.84
Race	.52	.38	.25
1961	1. Langan	2. McNally	3. Trimmier
Income	.32	.83	.81
Race	.71	.81	.82
1965	1. Langan	2. Mims	3. Outlaw
Income	.47	.83	.43
Race	.93	.96	.92
1969	1. Langan	2. Mims	3. Doyle
Income	.44	.90	.41
Race	.91	.95	.87
1973	1. Greenough/Bailey		2. Mims
Race	.79		.71

Regression - the numbers are circled on the chart.

1 - Race in Waynesboro strongly significant - Income also significant

1965	No.	Candidate	Coef.	Data Base
	1	Langan	.71	Ours
	2	Mims	.67	Ours
	3	Outlaw	.77	Ours
	1	Langan	.86	Voyles
	2	Luscher	.67	Voyles Ours
1969				
	1	Langan	.74	Ours
	2	Luscher	.78	Ours
	3	Doyle(run-off)	.38	Ours
	1	Bailey	.82	Voyles
1973				
	1	Bailey(run-off)	.51	Ours
		Smith	.83	Ours
		Taylor	.90	Ours
		Albert	.80	Ours
	1	Greenough	.59	Voyles

Referendum

1963		.58	Our
		.80	Voyles 1960 Data
1973		.80	Our

School Board

1970	Jacobs (runoff)	.87	Voyles
	Jacobs (")	.84	Ours
1972	Koffar (")	.83	Voyles
1974	Gill (runoff)	.89	Ours

Clarence Montgomery - legislative race 1969 not included - race tested at .89.

COUNTY COMMISSION

Regression		Candidate		Coef.	Data Base
		1968			
All Wards		1	Yeager	.46	Ours - Gen. Elec.
"		2	Smith	.17*	" "
"		3	Stevens	.06	" "
City Wards		1	Yeager	.31	" "
"		2	Smith	.10*	" "
"		3	Stevens	.08	" "
All Wards	'68 Run-off	1	Yeager	.78	Voyles Primary
"	" "	2	Smith	.73	" "
"	" "	3	Stevens	.90	" "
		1972			
All Wards		1	Yeager	.31	Ours Gen. Elec.
"		2	Smith	.83	" "
"		3	Haas	.81	" "
City Wards		1	Yeager	.33	" "
"		2	Smith	.84	" "
"		3	Haas	.82	" "
All Wards			Langan	.85	Voyles Primary
"			Mrs. Stevens	.35	" "
"			Cappa	.66	" "

Additional School Board Races

1962 Run-off	Goode	.83	Voyles
1966 Run-off	Russell	.95	Voyles

* Testing Income



JOHN LeFLORE



GERRE KOFFLER

WHO WILL RUN YOUR SCHOOLS?

GERRE KOFFLER FACTS:

RUNNING FOR PLACE NO. 3, SCHOOL BOARD COMMISSION, MAY 30th.

1. SIGNED AGREEMENT WITH NAACP TO ACHIEVE TOTAL INTEGRATION WITH TOTAL BUSING.
2. VERY ACTIVE IN THE MILITANT ORGANIZATIONS ACT, NAACP, NOW, NON-PARTISAN VOTERS LEAGUE, LEAGUE OF WOMEN VOTERS.
3. HAS ENTERTAINED BLACKS IN HER HOME.
4. HAS BEEN SEEN AND PHOTOGRAPHED IN COMPANY OF BLACK MALES.
5. UNDER INSTRUCTION OF ALBERT J. FOLEY IN THE CIVIL RIGHTS SCHOOL CURRENTLY.
6. POLLED 92% OF BLACK VOTE IN MAY 2, PRIMARY.

MAY 2 BLOCK VOTE

WARDS	Koffler	Sessions	Langan	McConnell
3 STANTON ROAD	748	170	1,071	48
10 DAVIS AVE.	829	123	820	87
31 PLATEAU	270	22	282	10
32 TRINITY GARDENS	320	24	372	41

PLEASE VOTE MAY 30

OFFICIAL C. B. I. REPORT DATE LINED MOBILE, ALA.



REMEMBER...it takes only a simple plurality to win.

There is no runoff.

BLACK TUESDAY

THE CHOICE IS YOURS

These people seek to destroy George Wallace and the Wallace Team

Bill Sellers—The State Of Politics

Wallace Popularity Assessed



WAS IT MONEY OR PROMISES THAT SECURED THIS BLOC VOTE?
BEAT THE BLOC! Vote and the Choice is Yours! Don't Vote and the Choice is Theirs!

72



HARRY McCONNELL IS CONCERNED WITH ISSUES, NOT RECORDS, but . . .

SPEAKING OF RECORDS . . .

1 Langan favors at least 40% property tax on all County property. Langan said, "However, just a 40% tax would be enough . . ."

(Mobile Press and Register, April 22, 1960)

2 Langan received following votes in the predominately black words.

	LANGAN	McCONNELL
WARD 1 (Stimpel Rd.)	250	13
WARD 2 (Toulminville)	473	56
WARD 3 (Stanton Rd.)	1071	49
WARD 10 (Davis Ave.)	820	87
WARD 20 (Herman Park Ballast)	360	10
WARD 31 (Mobile Co. Training-Plateau)	282	10
WARD 32 (Trinity Gardens)	372	41
PCT. 11 (Shepard Lake)	98	4
	3726	270
PERCENT OF VOTE	(93.2)	(6.8)

(From official Mobile County Democratic Primary Canvass signed by Jeff C. Mims, Chairman of Mobile County Democratic Executive Committee)

3 Langan was a City Commissioner the last time YOUR city sales tax was raised.

(October 1, 1959)

BELIEVE ALL THE PROMISES YOU WANT

...THESE ARE THE FACTS!

ON MAY 30 ... VOTE TO PROMOTE McCONNELL
PLACE 3 MOBILE COUNTY COMMISSION

PD. POL. ADV. BY GEORGE A. TOULMIN, MOBILE, ALA.

(1)

MAY

DON'T LET THE BLOCK VOTE BEAT YOU!

BOTTOM (R)

HELP MAKE SURE IT DOESN'T HAPPEN AGAIN

BLOC VOTE

LANGAN		88	485	245	262	304	380	10,912
BAILEY		34	18	11	32	9	8	123	18,135

LANGAN'S BLOC VOTE MARGIN 3,257 2,777 CITY MARGIN

BLOC VOTES UNDERMINES FREEDOM OF CHOICE FOR BOTH BLACK AND
CAREFULLY THOUGHT OUT VOTES OF OTHERS TO STOP
TUESDAY AND URGE EVERYONE TO DO THE SAME

pressure group control Joe Bailey. He's his own man every inch of the way and obligated absolutely to no one except the people of Mobile, be they black or white. He will be a delegate of the people and will be directed by them rather than by blocs, power groups, political ambition, personal opinions or outmoded methods. Bailey believes sincerely that the office of finance commissioner must be handled in an unobligated way so that your tax money will bring sorely needed services that have been too long denied

VOTE JOE **BAILEY**

PLACE 1, CITY COMMISSION

50



JOSEPH N. LANGAN
MOBILE CITY COMMISSIONER 1954-1969



JOHN L. LeFLORE
Appointed By Langan To Mobile Housing Board

WILL YOU LET THIS PAIR RUN YOUR CITY ANOTHER 4 YEARS?

MOBILE RANKS HIGH AMONG THE NATION'S CITIES IN MORTGAGE FORECLOSURES, BANKRUPTCY PROCEEDINGS, DEBT AND CRIME AND ARSON RATE!
IS THAT PROGRESS?

TO CHANGE THIS, LET'S GET BEHIND **BAILEY** FOR NEW LEADERSHIP & REAL PROGRESS

JOE LANGAN'S EPISTLE TO THE VOTERS OF WARD 10

"Then the voters were herded into the voting booths to be counted, the blind, the mutes, the dead, and the illitrates. And lo, 99% bore the brand of Joe Langan."

Then the FAITHFUL REJOICED. And they swarmed in the recreation center holding their Ward Tabulations aloft and crying out in a loud voice. "See how I delivered my ward." There is no Commissioner but Joe Langan and my cousin, Teddy, is his president."

The results were confirmed and the computers had ceased to compute, the politicians started forth on their pilgrimage to the Avenue... to receive the blessings of the chief politician and to pluck the sacred fruit of the tree of patronage.

But when they arrived they found Joe sitting disconsolately on a mountain of morning papers. And the music was stilled, no songs filled the air, and only the mournful howl of a few was heard in the land.

Then the ward heelers drew around and questioned him saying, "Wherefore art thou sad? Thou has overwhelmed thine enemies, yea even unto 99 percent in the colored wards.

But General Joe answered them saying, "BUT WHAT OF THE 1% WHO AMONG YOU HAVING LOST A SHEEP FROM HIS FLOCK, does not leave the 99 and go in search of the one that is lost.

Then Mr. Metro spoke in the voice of thunder saying,"I shall build my cousins Great Society in which there will be no percentages, no poverty, and no vehicle inspection stations, but possibly a ZOO.

Where the humblest citizens will have the same opportunities as Mr. Bill Crane, and Mr. Floyd Pate. Where the last shall be first, and the first shall be first and all others before and after him shall be first and Mobile County shall have 50 parks, 300 fire stations, 10 thousand miles of streets, 20 libraries, 6 tunnels, and 10 airports, and we shall receive 200 million dollars in poverty funds from my cousin, Teddy. WE SHALL EMBRACE ALL MEN AND WOMEN, BLACK OR WHITE, REGARDLESS OF PREVIOUS POLITICAL AFFILIATIONS."

But the ward heelers murmured against him for they feared if all partook, the Pork Barrel would soon be empty and they might be forced to help pay for the filling of it again. Then Mr. Metro knowing their thoughts, spoke to them saying, "OH, YE OF LITTLE FAITH, did I not cause the NAACP to lie down with the SILK STOCKING WARDS? Did I not convince the people of Mobile County that my TAX AND SPEND POLICY is the best way to balance the budget and not add any NEW TAXES and yet still have more PUBLIC IMPROVEMENTS, All these miracles of PROGRESS I have performed and YET YOU STILL DOUBT? COME LET US REASON TOGETHER OR ELSE!!!!

Plaintiffs Exhibit 62

.E REGISTER FINAL
d the Nation Since 1813
IALAND, ALA., FRIDAY MORNING, JUNE 25, 1976 10c DAILY 40c WEEKLY PLUS TAX

Numerous cross burnings spread across Coast area

A rash of cross burnings Wednesday night in predominantly black neighborhoods from Mobile to Pensacola, Fla. brought a promise from Baldwin County Sheriff Thomas "Buck" Benton "to stop it one way or another."

"Burning crosses is the most cowardly thing I know of— I just deplore it," Benton said, adding, "I plan to take some action." He added that anyone caught burning crosses in Baldwin County would be prosecuted.

State Troopers reported at least 25 crosses were set afire in the two southernmost Alabama counties. Meanwhile, at least seven crosses were reported burned in Escambia County, Fla. in front of black churches and organizations.

The Escambia County burnings came within hours of a school board decision relating to the nickname for racially-troubled Escambia County High School.

Henton said one student also involved shots being fired into the air, and one cross was burned in front of the home of a white family living in a predominantly black neighborhood.

Henton said he was unsure whether or not the Ku Klux Klan was involved in the cross burnings, but he said the incidents were apparently a "show of strength" by some elements in the area.

No arrests or injuries were reported. Officials said they are hampered because there is no law prohibiting cross burnings in Alabama.

Most of the crosses, reportedly four to five feet tall, were wrapped in burlap and doused with kerosene before they were set ablaze.

Reports placed the burnings at Fairhope, Tensaw, Whitehouse Forks, Crossroads, Clay City, Marlowe, Foley, Beulah Heights, Magnolia Springs and Mullet Point Park in Baldwin County. Mullet Point is an Eastern Shore public beach popular among Baldwin's blacks.

Mobile police said one cross was burned on Avenue A off Cottage Hill Road in front of a black man's house.

In Pensacola, targets included churches, schools, offices of the Southern Christian Leadership Conference(SCLC), the studios of television station WEAR-TV, and the home of a WEAR reporter.

The reporter, Ken Larson, and a black cameraman were reportedly refused admission to a Ku Klux Klan meeting recently.

Earlier Wednesday, the Escambia County School Board ruled it could change the nickname or symbol of the high school if it felt such action would be in the public interest. Once the name or symbol was adopted, only the school board could change it.

The school nickname first was an issue in 1975 when black students objected to the name Rebels and the Confederate flag as the school symbol. A federal judge's order banning the name was appealed by the school board, and racial disturbances ensued in the area.

Meanwhile, students voted to change the name to Raiders, which stuck until an appellate court overturned the original ban. Another student vote retained the name Raiders, but racial disturbances which followed injured several students.

The school board, in emergency action, changed the name to Patriots in March, and the decision Wednesday solidified that choice of nicknames.

Tyrone Brooks, an SCLC spokesman in Atlanta, called Pensacola "one of the most racist cities in America" and claimed that local officials condoned the cross burnings.

"It's a tragedy that this kind of thing would go on in 1976, and the only group I've ever known to burn crosses is the Ku Klux Klan," Brooks said.

A Klan spokesman denied any advance knowledge of the cross burnings.

The Southern Christian Leadership Conference asked for an FBI investigation of the cross-burning Wednesday in front of the civil rights group's office in Pensacola.

"We consider this act a blatant attempt by racists in Pensacola and Escambia County to intimidate and harass our chapter officials and the black community," SCLC president Ralph Abernathy said in Atlanta in a telegram sent Thursday to U.S. Atty. Gen. Edward Levi.

Brooks said Pensacola SCLC chapter president P.L. Henderson saw three white men setting fire to a cross as Henderson approached the building, but the men fled before he got there.

601

CITY
COMMITTEES

Plaintiffs Exhibit 64

PLAINTIFFS' EXHIBIT _____

COMMITTEE MEMBERS

		Black	Total Members	Total Prior Members	Prior Black Members
1	BOARD OF ADJUSTMENT	1	7	9	0
2	AIR CONDITIONING BOARD	0	5	2	0
3	ARCHITECTURAL REVIEW BOARD	0	5	6	0
4	AUDITORIUM BOARD	3	12	9	2
5	MOBILE BEAUTIFICATION BOARD	3	20	17	0
6	MOBILE BI-CENTENNIAL COMMUNITY COMMITTEE	3	46	0	0
7	CENTER CITY DEVELOPMENT AUTHORITY	0	1	0	0
8	BOARD OF EXAMINING ENGINEERS	0	3	0	0
9	BOARD OF ELECTRICAL EXAMINERS	0	4	3	0
10	CITIZENS ADVISORY GROUP FOR THE MASS TRANSIT TECHNICAL STUDY	3	8	0	0
11	CITIZEN ADVISORY COMMITTEE - DONALD-CONGRESS, LAWRENCE ST. & THREE MILE CREEK FREEWAY	11	15	0	0
12	CODES ADVISORY COMMITTEE	0	17	0	0
13	COMMISSION ON PROGRESS	9	21	0	0
14	EDUCATIONAL BUILDING AUTHORITY, INC.	0	3	0	0
15	MOBILE AREA PUB HIGHER EDUCATION FOUNDATION INC.	0	6	0	0
16	FINE ARTS MUSEUM OF THE SOUTH AT MOBILE	1	21	20	1
17	FORT CONDE PLAZA DEVELOPMENT AUTHORITY	0	4	1	0
18	MOBILE HISTORIC DEVELOPMENT COMMISSION	0	52	61	0
19	INDEPENDENCE DAY CELEBRATION COMMITTEE	1	14	0	0

716

602

CITY
COMMITTEES

PLAINTIFFS' EXHIBIT _____

COMMITTEE MEMBERS

		Black	Total Members	Total Prior Members	Prior Black Members
20	INDUSTRIAL DEVELOPMENT BOARD	0	15	0	3
21	MALAGA DAY COMMITTEE	0	7	0	0
22	MOBILE HOUSING BOARD	1	5	2	0
23	MOBILE MEDICAL CLINIC BOARD - PSYCHIATRIC	0	3	0	0
24	MOBILE MEDICAL CLINIC BOARD - TRANQUILAIRE	0	3	0	0
25	PORT CITY MEDICAL CLINIC BOARD	0	3	0	0
26	MOBILE MEDICAL CLINIC BOARD - SPRINGHILL	0	3	0	0
27	MEDICAL CLINIC BOARD OF THE CITY OF MOBILE	0	3	0	0
28	MEDICAL CLINIC BOARD - SECOND	0	3	0	0
29	MOBILE MEDICAL CLINIC BOARD	0	3	0	0
30	MOBILE LIBRARY BOARD	2	14	6	0
31	GREATER MOBILE MENTAL HEALTH-RETARDATION BOARD	0	5	0	0
32	PIER AND MARINA COMMITTEE	0	3	0	0
33	MOBILE PLANNING COMMISSION	1	7	8	1
34	POLICEMEN AND FIREFIGHTERS PENSION AND RELIEF FUND BOARD	0	7	3	0
35	MOBILE TREE COMMISSION	0	4	5	0
36	NEIGHBORHOOD IMPROVEMENT COUNCIL	4	29	20	2
37	PLUMBERS EXAMINING BOARD	0	5	0	0
38	RECREATION ADVISORY BOARD	1	22	0	0

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603

CITY
COMMITTEES

PLAINTIFFS' EXHIBIT _____

COMMITTEE MEMBERS

		Black	Total Members	Total Prior Members	Prior Black Members
39	SOUTH ALABAMA REGIONAL PLANNING COMMISSION	1	6	0	0
40	BOARD OF WATER & SEWER COMMISSIONERS	1	5	7	0
41	EMPLOYEES INSURANCE ADVISORY BOARD	0	10	0	0
42	MOBILE COUNTY HOSPITAL BOARD	1	9	0	0
43	FRANK S. KEELER MEMORIAL HOSPITAL	0	2	0	0
44	ARTS HALL OF FAME COMMITTEE	0	1	0	0
45	PUBLIC EDUCATION BUILDING AUTHORITY	0	3	0	0
46	EDUCATIONAL BOARD	0	9	0	0
	TOTALS	47	461	179	6

SUMMARY:
- 10.1% of present appointments are black.
- 8.2% of all appointments to active committees are black.
- 7.5% of all appointments to active and inactive committees are black.
- If 2 committees, numbers 11 and 13, are excluded the other 44 active committees have 6.3% black members.
- 29 of 46 committees (63%) have no blacks.
- Only 3 of 46 committees, numbers 4, 11 and 13, have blacks at 25% or more of their membership.

718

604

CITY
COMMITTEES

INACTIVE

PLAINTIFFS' EXHIBIT _____

COMMITTEE MEMBERS

		Black	Total Members	Total Prior Members	Prior Black Members
A	AMBULANCE ADVISORY COMMITTEE	0	5	0	0
B	ANIMAL SHELTER BOARD	0	9	0	0
C	CHILDREN'S THEATRE ADVISORY COMMISSION	0	9	0	0
D	MAYOR'S COMMITTEE ON RECIPROCAL SWITCHING	0	6	0	0
E	MOBILE AIRPORT PLANNING ADVISORY COMMITTEE	5	120	0	0
F	MOBILE COUNTY LAW ENFORCEMENT PLANNING AGENCY SUPERVISORY BOARD	0	2	0	0
G	MOBILE INSURANCE ADVISORY BOARD	0	12	0	0
	TOTAL	5	163	0	0

719

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

SPECIAL REPORT OF THE
MARCH - APRIL, 1976
GRAND JURY OF MOBILE COUNTY

We the March - April, 1976 Grand Jury of Mobile County, Alabama, after having been recalled specially to consider evidence gathered by the Mobile County District Attorney's Office regarding eight (8) City of Mobile Policemen and Glenn L. Diamond, do hereby submit to the Court our special report and hand to the Court 5 indictments.

On April 22, 1976, this Grand Jury was called into session by the Honorable Robert E. Hodnette, Circuit Judge, and ordered to report on April 23, 1976 at 10:00 A.M. At that time Judge Hodnette instructed this Grand Jury to consider and delve into evidence presented to us by the Mobile County District Attorney. The District Attorney has presented to us the result of a diligent and honest investigation into the facts and circumstances surrounding the incident. After carefully and conscientiously considering all of the evidence from Glenn L. Diamond, his companions and the accused police officers, we feel compelled and have the responsibility to make certain observations, suggestions, and recommendations to the Courts and to the governing body of the City of Mobile, particulary the Mobile City Police Department.

The law abiding citizens of this community cannot condone the event which errupted on the night of March 28, 1976. We feel that in these days and times where crime runs rampant a strong, tough approach must be taken to apprehend the criminal element. Equally important law enforcement officers must deal with the criminal in a professional manner.

We want to make it clear that we feel that the vast majority of our county's law enforcement officers dedicate their lives to professional and conscientious work in protecting our citizen's lives and property. This incident in our opinion represents the deeds of a very small, small group of men who exceded their lawful authority and acted in a totally irresponsible manner. They not only did not uphold the law but apparently violated the very law that they swore to uphold. This incident should not reflect in any manner on all of law enforcement. As a matter of fact, we again recognize and commend the overwhelming majority of our law enforcement officers. The activities which occurred on the night of March 28, 1976, have stained the very uniform of conscientious law enforcement officers. Our community must not let these acts in any way affect their cooperation and support of law enforcement.

We feel that the general public should realize that the men charged are not supervisors. They are patrolmen out on the beat. We heard evidence from both the victim and a number of the accused police officers. The officer's testimony indicates to us that their illegal actions were not random, spur of the moment acts taken in violation of their supervisor's orders. On the contrary, these men have indicated to us that their supervisors not only accepted but urged these patrolmen to commit these improper, irresponsible acts. We feel these few policemen would not have followed this irresponsible course of action had they not been encouraged and at times compelled to commit the assault by certain very few supervisory offiers. Although we the Grand Jury feel that this unfortunate supervisory problem cannot excuse individual illegal misconduct, we feel that these officers would not have engaged in these activities if their supervisory officers had provided the proper advise, guidance and supervision.

To solve this deplorable situation and to insure that future illegal acts do not occur, we recommend and urge that the City Commission thoroughly investigate the police department, particulary the patrol division. This investigation should be made by officers who are charged with one duty: to seek the truth.

Also, we heard testimony from the accused officers that many supervisory vacancies exist. They must be filled by qualified, dedicated law enforcement personnel. For that reason, we suggest that the City of Mobile request the Mobile County Personnel Board to administer the appropriate examinations and to hire or promote the most qualified individuals to the available jobs. Possibly better supervision could have prevented the actions of these few men on that particular night.

As a Grand Jury we are well aware that our duty is not only to indict the guilty but also to exonerate the innocent. After hearing all the evidence , we believe that three of the suspended patrolmen are surely not guilty. These men were not involved in this unfortunate event. They were victims of circumstance. They not only did not participate in it but they reported the incident to their supervisors. Therefore we recommend that the City Commission end their suspension and reinstate them as patrolmen. Also we believe they should receive back pay to cover the period during which they were suspended.

As the Grand Jury , we are charged with the duty of considering all the evidence. We feel we have put aside all preconceptions we had while considering this evidence. Furthermore we must say that this case constituted the most trying and difficult days of our term as Grand Jurors.

Finally we wish to commend the District Attorney and his staff for taking the swift, immediate, and decisive action to honestly and objectively uncover, develop and present the hard cold facts.

We wish now to be put into recess until recalled by this Court or until another Grand Jury is empanelled.

Russell I Beason
FOREMAN

Virgil E. Blanks

Vernon A Hardwick

Oscar A. Gray

Larry L. Dunn

W B Joyce

William D Adcox

Paul S Campbell Jr

Thomas A. Hayes

John A. Colombetti Jr.

Harold S Rodgers

Ronald M Ridgeway

Thomas L Sigler

Jamie E Bristow

LOCAL NEWS MOBILE REGISTER
Serving the South and
TELEPHONE 433-1551 MOBILE, PRICHARD, CHICKASAW, SARALAND,

City searching for ways

By DAVID SPEAR
Press Register Reporter

In the wake of the worst officer accountability crisis in the history of the Mobile Police Department, city officials Friday began searching for means to rebuild the devastated and disgruntled 300-man force.

A total of 16 officers have been disciplined in the last 60 days and Police Commissioner Robert B. Doyle Jr. and Police Chief Don Riddle conceded Friday that department morale "has never been worse."

"We know the men are upset, unhappy and confused," Doyle said, "This has been a very hard time for all of them and all of us. The original disciplinary action in April (in which one officer was fired and seven suspended) was difficult enough and this (Thursday's firing of two officers and the suspension of six others) have just made a bad situation worse."

"But as tragic and distasteful as it has all been," Doyle continued, "it had to be done and it has been done. Now, we have got to get the department moving again."

The embattled Riddle, who was a close personal friend of several of the men he was forced to censure, echoed Doyle's remarks.

"You don't know how badly I hate all of this," Riddle said, "but what has happened, as bad as it is, is over and now, we've got to address ourselves to the present situation and make every effort to regroup as quickly as possible and begin doing our jobs again."

Earlier Friday, Doyle made public the reasons Thursday's firings of Sgt. Ronald K. Mair and Patrolman Henry J. Booth and suspensions of Lts. Walter Milne and Clarence J. Lund, Sgt. Thomas Lee, and Patrolmen Robert Duff, Leroy Sieck, and John Boone.

Mair was fired for failing to report abusive treatment of a citizen by Boone, for improper supervision, violations of citizens' constitutional rights, neglect of duty, and encouragement of illegal actions by men in his command.

Booth was dismissed for mistreatment of citizens on several occasions from December, 1974, until last January, and for an incident in April in which he reportedly took persons into custody, transported them to an isolated area, and left them.

Milne drew a 30-day suspension for failing to take disciplinary action in connection with abusive treatment of a citizen by Duff and, on another occasion, by an unnamed officer.

Lund was suspended for 30 days for reporting for duty on several occasions "with the odor of alcohol on your breath," for failing to provide proper supervision, and for encouraging illegal actions by men in his command.

Lee, who ironically is the Mobile and Alabama Jaycees' "Outstanding Law Enforcement Officer of the Year" and the Mobile Exchange Club's "1976 Policeman of the Year," was suspended for 20 days for failing to report an incident involving Boone, and for participation in the probable violation of a citizen's constitutional rights immediately following that incident.

Duff drew a 15-day suspension for mistreating a person he had taken into custody last month.

Sieck was also suspended for 15 days for participation in the incident involving Booth.

Finally, Boone drew a 15-day suspension for an incident involving Mair, Lee, and himself.

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to rebuild police force

Specifics of the incidents were not revealed, but all came to light during a departmental investigation of police conduct that was launched two months ago in the wake of an alleged mock lynching on March 28 of a black robbery suspect by eight other officers, all of whom are white.

Shortly after that incident came to light in early April, the just-concluded investigation began and expanded to include other alleged misconduct and the original eight officers were themselves disciplined.

Patrolman Michael Patrick was fired and Patrolmen Vernon Straun, Kenneth Powell, Wilbur Williams, Danny E. Buck, and Everett Alan Brown, and Patrolmen First Class Roy Adams and James R. Coley, were all suspended for 15 days.

Patrick, Straw, Powell, Williams, and Adams were subsequently indicted by a Mobile County grand jury on assault and battery charges in connection with the incident, in which a looped rope was placed around the neck of 27-year-old Glenn Dicmond.

All five are awaiting trial and the suspensions of the four indicted with Patrick have been continued indefinitely.

The men were all members of the Patrol Division's "300 Squad," a special robbery-burglary detail of which Mair and Lund were supervisors.

The grand jury was told by some of the officers that Mair and Lund knew of the lynching matter, but failed to do anything about it.

Both men have denied the charge.

All of the policemen disciplined Thursday were also Patrol Division members, many with long, virtually unblemished service records. Four were supervisory personnel.

None of the men were available for comment, but several are expected to appeal the censures to the Mobile County Personnel Board here.

A total of 54 officers and 60 private citizens were questioned during the departmental investigation which was directed by Riddle and City Attorney Fred Collins.

Fifteen officers took polygraph (lie detector) tests.

Doyle, in looking back over the last two months, said Friday afternoon that he believes a lack of proper training of the men, particularly supervisors, was chiefly responsible for the misconduct.

Consequently, several new training programs will be established, including efforts to teach supervisors to detect undue tension and strain within their men.

Also, an outside agency is expected to be retained for a management and effectiveness study of the entire department.

Finally, an Internal Affairs Division that will, in effect, police the police department is being established.

Doyle said Friday that the investigation and disciplining is an indication the police department will "clean its own house," and he added the community should not abandon the police.

The Mobile Police Department is a good department," he said, "It has a good record and it has some of the most dedicated men and some of the finest men of any police department in the country . . . The great majority of the men do an excellent job and the community can be proud of them."

Plaintiffs Exhibit 73

SUMMARY

The City reports 1369 white employees and 489 black, employees, i.e. 26.3% black. If the lowest job classification, Service/Maintenance, is removed the percentage of black employees falls to 10.4%. If the lowest salary classification is removed, less than $5,900/year, the percentage of black employees falls to 13.8%.

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1135

PLAINTIFFS' EXHIBIT _____

CITY 1975	#1 Fin. Admin.	#2 Streets Highways	#4 Police	#5 Fire	#6 Nat. Res.&Parks	#9 Housing	#10 Community Development	#12 Utilities &Transp.	#13 Sanit.& Sewage	#15 Misc.	Totals	% Black
Officials Administrative	13	1	9	6	13	5	1	3	1	6	54	6
	1	-	-	-	-	-	-	-	-	-	1	100
Professionals	9	-	16	1	1	-	2	1	-	10	56	1
	2	-	-	-	-	-	-	-	-	-	2	100
Technician	14	6	66	85	3	22	4	-	1	19	220	1
	4	-	-	-	-	-	-	-	-	-	4	100
Protective Service	-	-	117	309	4	-	-	2	-	-	432	54
	-	-	-	-	-	-	-	1	-	-	1	100
Para.Professional	-	-	-	-	40	50	-	-	2	-	92	54
	-	-	-	-	-	-	-	-	-	-	-	-
Office Clerical	54	5	43	4	11	3	4	6	2	25	157	34
	1	-	-	-	-	-	1	-	-	3	5	100
Skilled Craft	-	15	-	-	-	-	-	-	-	13	28	11
	-	2	-	-	-	-	-	-	-	1	3	100
Service/Maint.	-	20	6	-	7	-	-	46	54	33	166	67
	-	104	3	-	44	-	1	33	124	21	346	67
Totals	90	47	370	425	80	28	6	55	75	166	1268	67
	2	106	46	15	122	2	-	1	126	34	487	67
	W	B	W	B	W	B	W	B	W	B	W	B

W - White

B - Black

* Individual statistics do not match EEO-4 totals.

1/ Includes 15 denominated "other" as white.

PLAINTIFFS' EXHIBIT _____

SUMMARY ANALYSIS
CITY OF MOBILE EMPLOYMENT - 1975
BY RACE, SALARY AND JOB CLASSIFICATION
SOURCE: STATE AND LOCAL GOVERNMENT
INFORMATION (EEO-4) SUBMITTED TO THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Annual Salary in Thousand $		Financial Admin.	Streets & Highways	Police	Fire	Natural Resources & Parks	Housing	Community Develop.	Utilities & Transp.	Sanitation & Sewage	Misc.	Total	% Black
0-5.9		19	13	26	2	38	3	-	7	94	51	186	61.6%
		90	90	2	-	2	-	-	9	37	21	299	
	W												
	B												
6.0-7.9		21	19	42	2	30	1	-	46	25	48	241	34.1%
		1	15	6	-	30	1	-	-	26	9	125	
	W												
	B												
8.0-9.9		14	10	108	309	8	13	-	5	3	58	531	10.3%
		1	1	37	15	1	-	-	1	1	4	61	
	W												
	B												
10.0-12.9		15	4	72	102	6	9	3	-	1	16	234	.8%
		-	-	1	-	-	1	-	-	-	-	2	
	W												
	B												
13.0-15.9		8	-	7	3	5	2	-	-	-	8	35	2.7%
		-	-	-	-	-	-	-	-	-	-	1	
	W												
	B												
16.0-24.9		7	1	2	2	2	-	2	-	-	3	21	0.0%
		-	-	-	-	-	-	-	-	-	-	0	
	W												
	B												
Totals		90	47	370*	420-1/5	80*	28	9*	66	75*	184	1248	487
		2	106	46	15	122	2	1*	35	126	34	487	
	W												
	B												

W = White
B = Black

* Individual statistics do not match EEO-4 totals.

1/ Includes 15 denominated "other" as white.

Plaintiffs Exhibit 75

Group	Total Streets (Miles)	% Unpaved	% Paved Since 1970	% Unpaved	% Paved Since 1970
1	117.78	.85	15.9		
2	350.06	2.6	13.0	2.8	15.6
3	147.61	4.7	21.8		
4	35.56	1.4	23.7	-	-
5	72.31	.9	5.8		
6	55.72	13.8	14.8	6.5	9.7

Group	% of City Voters	Miles of Paved per 1% Voters	Miles unpaved per 1% of Voters	Miles paved since 1970 per 1% of Voters
1	9.3	12.55	.10	1.97
2	42.5	8.01	.22	1.07
3	14.7	9.55	.48	2.18
4	3.	11.68	.17	2.81
5	11.5	6.22	.06	.36
6	9.3	5.16	.82	.88

Group	% of City Voters	Miles paved % of Voters	Miles unpaved % City Voters	Miles paved since 1970 % of City Voters
I, II & III	66.5	8.99	.26	1.44
V & VI	20.8	5.75	.40	.59

UNITED STATES GOVERNMENT 965 The Department of the Treasury
Washington, D.C.

Memorandum

TO : The File DATE: 8-31-73

FROM : Robert Murphy, Malaku Steen, Paul Landry and Elliott Clark

SUBJECT: Compliance Trip to Mobile, Alabama

BACKGROUND

The Office of Revenue Sharing received a complaint from the Mobile, Alabama-Branch of the National Association for The Advancement of Colored People, charging the City of Mobile with discrimination in the distribution of Revenue Sharing Funds. The two (2) main areas of concern are related to paving or resurfacing ventures and city operated recreational facilities.

During the period August 15-17, 1973, the Compliance Manager of the Office of Revenue Sharing, along with an Equal Opportunity Specialist, an Auditor, and a representative from the Department of Justice were in Mobile, Alabama investigating the complaint of discrimination. The investigation involved: 1) meeting with City Officials (the Mayor, Finance Commissioner, City Planning Director, Senior Engineer for Public Works, etc.); 2) meeting with the complainant and other representatives of the Black community (President, Mobile, Alabama Field Director of the NAACP, the Pastor of a Baptist Church, etc.); 3) making site inspections of the alleged discriminatory areas and other

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

areas in the City of Mobile; and 4) examining records of a financial nature to determine where Revenue Sharing Funds have been expended, obligated and budgeted.

For the period October 1, 1972 to September 30, 1974, the City of Mobile anticipates receiving $12,226,000 of Revenue Sharing Funds. Of this amount $7,452,900 is planned for Public Works (paving, drainage, resurfacing various streets, culverts, purchasing specialized vehicles, etc.), and $1,572,000 is planned for Parks (swimming pools, recreation center, etc.). See Exhibit "A" attached for details. As of July 31, 1973 approximately $1,950,000 had been expended and approximately $950,000 had been encumbered for a total of approximately $2,900,000. See Exhibit "B" attached for details.

FINDINGS AND CONCLUSIONS

Recreational Facilities

The meeting with the members of the Black community focused primarily on two recreational areas - Herndon Park, which is in a white area, and Gorgas Community Center, which is in a Black area. In addition, the NAACP, Mobile, Alabama Branch, took issue "with the near million dollar planned expenditure on a golf course".

Pictures of the two parks clearly show that Herndon Park is in better condition than Gorgas Community Center. Furthermore, the swimming pool in the Center is not operative and is in dire need of repairs. The Revenue Sharing Budget for Parks

(Page No. 13, Budget Number 432) shows that $119,400 was budgeted for the Gorgas Park pool for Fiscal Year 1972-1973. We were advised by City officials that the pool situation at Gorgas will be rectified before next summer (plans call for a new pool to be built).

Another area mentioned by the NAACP in their complaint to the Mayor of Mobile was the Joe Radford Thomas Center. Renovation of the pool in this Center is included in the Revenue Sharing Budget (#433) in the amount of $73,200 for Fiscal Year 1972-1973. It is anticipated that the renovation will be completed by next summer also.

Regarding the golf course, we found a proposal to the United States Department of the Interior, Bureau of Outdoor Recreation, requesting 50% Federal assistance, namely, $265,953 (the balance to come out of the City of Mobile's Capital Fund - not Revenue Sharing), for a 9-hole golf course, driving range, etc., in Miller's park. City officials confirmed that there were no plans to use Revenue Sharing Funds for constructing a golf course.

Regarding recreation, we conclude that the claim of discrimination is not supported by the facts. We should follow-up to see that the pools in minority areas are constructed or renovated in time to be used by the beginning of next summer. City officials advised that the delay was partly due to the fact that the City was caught in a bind with the contractors due to the additional amount of work generated by the receipt

of Revenue Sharing Funds.

Paving, Resurfacing and Drainage

Our review did not substantiate the charge of discrimination relating to the assignment of priorities for paving, resurfacing, and drainage of the various city streets of Mobile. In many cases, resurfacing and drainage projects are already in process in certain areas of the Black and White neighborhoods.

We were informed by city officials that the areas selected were in conformance with the overall Mayor Street Plan of 1968, which was accelerated due to receipts of the Revenue Sharing Funds. Areas such as those located in the vicinity of the Mobile General Hospital were cited as having higher priority because of the floods which cut off access to the hospital. The city also maintains that the areas selected for drainage were selected because of the topography which necessitates doing certain areas first.

The complainant provided several photographs to support his allegation of discrimination in the assignment of priorities, but it appears that the complainant was not aware of the city's criteria used for establishing priorities.

Examples of some of these streets cited by the complainant as needing resurfacing were Summerville Street intersecting at Joy Lane, Stanton Street, and the Old Shell Road from Bay Shore Avenue to Martin Street which has open ditches. Two of these were mentioned in the Mobile Newspaper as slated for

resurfacing and are now in process. The Old Shell Road area has not been considered for repairs within the period of the two-year program, but later discussions with Mobile City Officials indicated that this area will be repaired during the 2nd year of the program. A review of the two-year budget for the Revenue Sharing Funds, and the areas outlined on a map provided by the city, disclosed that plans do include areas of the Black communities. However, it is quite evident that these areas to a very large degree (with the exception of Trinity Gardens and the Bay Bridge Area) are being used for commercial and commuter traffic, (such as Davis, Stanton, Donal, and Summerville Street,) rather than for the use of citizens in more generalized residential areas. The yellow areas noted on the map indicates that resurfacing projects have been concentrated on many of the main and side streets of the White neighborhoods. There is clear evidence that the resurfacing projects were not performed on an equable basis among the neighborhoods.

The complainant also provided several photographs of areas which had poor drainage, such as Chisam and Persimmon Street which were caused by the dike built by the city to retain the water from the river. The city has now agreed to cut a hole in the dike, so that the accumulated water can filter into the river.

The total allocation of Revenue Sharing Funds (approximately $1,176,000) for the installation of drainage systems has been limited to the neighborhoods of; Riverside, Beichleiu, Mertz, Maryvale, Maysville, Rolling Acres, Jackson, Bolton and Airmont. Some of these neighborhoods are shown as areas with drainage problems, but others are indicated as having adequate dranage. All of these neighborhoods are predominantly White. Those areas which were considered with adequate drainage were included in the Revenue Sharing Budget, when those in the Black neighborhood listed as poor drainage were not. Also, we noted that the city's capital budget shows that $700,000 was allocated for a drainage project along the Dog River area which is also predominantly White. We did note however, that the city of Mobile has allocated approximately $1,000,000 for the drainage system along the 3 mile Creek area and the Downtown section, which is predominantly Black.

General

Pointing out specific areas where streets have poor drainage, where there are open ditches, pot-holes, etc., does not of itself prove discrimination.

Supreme Court, U. S.
FILED
AUG 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

EDWARD STILL
601 Title Building
Birmingham, Alabama 35203

J. U. BLACKSHER
LARRY MENEFFEE
1407 Davis Avenue
Mobile, Alabama 36603

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York

Counsel for Appellees

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 77 -1844

CITY OF MOBILE, ALABAMA, et al.,

Appellants,

v.

WILEY L. BOLDEN, et al.,

Appellees.

On Appeal From The United States Court of Appeals For the Fifth Circuit

---

MOTION TO AFFIRM

QUESTIONS PRESENTED

1. Were the concurrent factual findings of the courts below, that Mobile's at-large election plan is maintained for the purpose of discriminating against black voters, clearly erroneous?

2. Should the decision of the Court of Appeals be affirmed on the alternative ground--considered but not relied on by a majority of the Fifth Circuit panel--that Mobile's at-large election plan had the effect of disenfranchising black voters in violation of White v. Regester, 412 U.S. 755 (1973)?

3. Did the District Court err in adopting its own plan where the appellants refused to propose any remedial plans and where the District Court injunction expressly permits state and local officials to modify that court plan?

STATEMENT

Black citizens of Mobile, Alabama, brought this action in June, 1975, challenging the at-large system of electing members of the Mobile City Commission. Following a 6 day trial, in which 37 witnesses testified and 153 documentary exhibits were introduced, and following a half-day tour of the city by the District Judge, the trial court determined that the at-large elections were being used purposefully and invidiously to discriminate against black voters. The salient findings of fact, affirmed in all respects by the Court of Appeals are as follows:

1. The Long History Of Voting Discrimination Against Blacks in Mobile

The "Redemption" of Alabama by the Bourbon Democrats from Federal Reconstruction policies culminated with the enactment of various so-called Progressive reforms. In Alabama, the Progressive movement included disfranchisment of

blacks because they were considered a corrupting influence. The 1901 Albama Constitutional Convention was called for the primary purpose of disenfranchising blacks. The cumulative poll tax and grandfather clause were the primary devices used to accomplish this. Delegates from Mobile led the efforts to remove blacks from politics in 1901, and some of these same white Mobilians promoted the adoption of an at-large elected city commission for Mobile in 1911. Only token numbers of blacks were allowed to register and vote until passage of the Voting Rights Act of 1965. J.S., pp. 19b-20b, 29b. Alabama operated an all-white Democratic primary until well after it was outlawed by this Court in Smith v. Allright, 321 U.S. 649 (1944). A white state legislator from Mobile was chiefly responsible for the enactment of interpretation tests as a device to prevent blacks from voting after the white primary was struck down. The interpretation tests were declared unconstitutional by the federal court in Mobile. Davis v. Schnell, 81 F.Supp. 872 (S.D. Ala. 1948), aff'd, 336 U.S. 933 (1949).

In 1964, the Mobile County legislative delegation sponsored a special law to enable Mobile to change to a Mayor-Council form cf government after a referendum election. A former State Senator from Mobile who participated in the law's passage testified that the local delegation chose to provide for at-large election of the proposed council, rather than single-member districts, because of racial considerations:

> Q. Why was the opposition to single-member districts so strong?
>
> A. At that time, the reason argued in the legislative delegation, very simply was this, that if you do that, then the public is going to come out and say that the Mobile Legislative Delegation has just passed a bill that would put blacks in City office. Which it would have done had the City voters adopted the Mayor-Council form of govenment.

The District Court found, as a matter of fact, that "[t]hese factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a Federal Court order." J.S., p. 30b.

2. The Present Denial Of Effective Participation In The Political Process

In the opinion of the court below, the total absence of black elected officials in Mobile was "[o]nly one indication that local political processes are not equally open [to blacks]." J.S., p. 7b. The District Judge also relied upon evidence presenting a thorough analysis of racial politics in Mobile.

Expert statisticians and political scientists analyzed most of the local elections in the city [1/] and county over the past 15 years. The unsuccessful candidacies of 4 black citizens who sought school board seats, 3 blacks who ran for city commission and 2 black candidates for at-large legislative seats were thoroughly explored, as were the racial campaign tactics used to stir up white backlash and defeat several white candidates who dared to espouse some interests of the black community.

1/ The City of Mobile contains approximately two-thirds of the population of Mobile County. The District Court considered the election experiences of black candidates in county-wide races to be relevant as well as to an analysis of city politics. J.S., pp. 6b-10b, 13b, n.7.

While most white candidates actively seek black votes as well as white votes, there was uniform agreement among the experts and politicians that to be successful a candidate must be careful not to be tagged with the "bloc [black] vote," which was tantamount to the "kiss of death," according to the City's own expert political scientist. All of the witnesses (except one defendant city commissioner) agreed that it would be difficult if not possible for a black candidate to overcome the solid racially polarized voting patterns in Mobile and win an at-large election. Most of the prominent leaders and politicians in the black community testified at trial, and without exception they agreed that the futility of the effort prevented them from even considering running for the city commission under the at-large system. The District Court accepted the opinion of plaintiffs' expert political scientist that black voting strength is "basically cancelled or negated in the at-large structure in the Mobile City elections."

3. Unresponsiveness Of Elected Officials To Black Community Interests

Much of the long trial was devoted to evidence of how unfairly Mobile's all-white government has treated black citizens. The

District Court found that "[t]he at-large elected city commissioners have not been responsive to the minorities' needs." J.S., p. 11B. To support this finding, the court's opinion refers first to continuing racial discrimination by the city in employment. The court still monitors compliance with its earlier decree ordering desegregation of the Mobile Police Department. Id. Other federal court orders were required to desegregate public facilities in the City of Mobile. J.S., p. 12b. Blacks have been appointed to important governmental boards and committees in only token numbers. J.S., pp. 12B-14b. Black residential areas have suffered inequitable neglect with respect to such vital services as drainage control, paving and resurfacing streets and the placement of sidewalks. J.S., pp. 15b-171b.

Perhaps most importantly, the court found that city commissioners have been insensitive to long-standing complaints of police brutality directed against blacks and the continuing recurrence of cross burnings. In particular, the trial judge was critical of the "timid and slow reaction" of city government in investigating and disciplining seven white Mobile police

officers who actually carried out a "mock lynching" of a black suspect on a downtown street corner. It was confirmed finally that these officers placed a rope around the suspect's neck, threw it over a live oak branch, and pulled the black man to his tiptoes. The court found that the "sluggish and timid response" of elected city officials to the lynching incident "is another manifestation of the low priority given to the needs of black citizens and of the political fear of a white backlash vote when black citizens' needs are at stake." J.S., p. 19b.

ARGUMENT

1. Notwithstanding appellants' extensive discussion of the meaning and application of the dilution rule of White v. Regester, 412 U.S. 755 (1973), the decisions below rest, in the first instance, not merely on the discriminatory impact of the at-large election system, but on a finding of fact that Mobile's system of electing Commissioners is motivated by an unconstitutional desire to discriminate against blacks. J.S., pp. 12a, 30b. This case thus presents primarily an application of Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

The district court made a finding of discriminatory intent after an exhaustive analysis of the evidence presented at a six day trial. J.S., pp. 286b-31b. The court of appeals carefully scrutinized the record and concluded that the district judge's detailed findings of fact were not clearly erroneous and that they compelled a finding of discriminatory intent. J.S., p. 12a. This Court does not ordinarily "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1961). No such unusual circumstances are present here.

The record contains ample evidence to support the finding that discriminatory intent lay behind the decision of the legislature to maintain the at-large election of Commissioners in Mobile. Until 1965 blacks were largely unable to register in Mobile or elsewhere in Alabama, and racial discrimination in voting had been the announced state policy since at least 1901. The district court found, based on the direct testi-

mony of several state legislators who participated in consideration of redistricting bills for Mobile, that the legislature would not pass "any effective redistricting which would result in any benefit to black voters." J.S., p. 30b. At-large elections were found to effectively disenfranchise blacks in Mobile because of a particularly virulent hostility by white voters, who have not only voted as a bloc against any black candidate for any office in Mobile, but have also repeatedly defeated white candicates who have been notably responsive to black needs. J.S., p. 17b-10b. After detailed analysis of all the election returns, the district court considered and rejected appellants' contention at trial that, just because blacks sometimes vote for winners in elections that are not racially polarized, they wield an effective "swing vote."

Against this background of historical discrimination against black voters in Alabama, and in light of a present legislative practice of refusing to adopt redistricting measures that might result in the election of blacks, the courts below were entirely justified in concluding that the maintenance of at-large voting in

this particular case was racially motivated. Arlington Heights v. Mewtropolitan Housing Corp., supra, 429 U.S. at 266-68. The lower courts did not ignore appellants' assertion that the at-large elections have been used for over half a century because of corruption problems in 1911; they merely made a factual determination that that somewhat implausible explanation was not the actual reason for maintaining the present method of election.2/

Appellants suggest the courts below adopted a rule of law that discriminatory intent must be inferred whenever a legislature fails to adopt a districting plan it knows is favorable to blacks. J.S., pp. 7, 24-26. Appellants point to no language in either opinion adopting such a rule, and none is to be found. On the contrary, the same panel of the Fifth Circuit which affirmed a finding of discriminatory intent in this case

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2/ The decisions below express no preference for single-member districts as opposed to at-large elections from a political science standpoint. Beyond the issue of racial discrimination, political commentators disagree whether the purported greater "efficiency" of at-large elected local governments can offset their high price of political control by strong financial interests and the loss of grass-roots input. See Kendricks v. Walder, 527 F.2d 44, 51-54 (7th Cir. 1975) (Pell, J., dissenting).

held in two companion cases that such intent had not been adequately demonstrated, even though both of those cases involved the same circumstances which appellants claim mandate a finding of intent under the Fifth Circuit's decisions. Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978). Appellants argue that appellees were obligated to establish not only that maintenance of the at-large plan was motivated in part by a racially discriminatory purpose, but also that that plan would not have resulted even absent that unlawful purpose; the burden of proof as to the latter issue, however, was clearly on appellants. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 2709, n.21 (1978). The decisions below do not sound the "death knell of the Commission form of government" outside of Mobile, and even there do not forbid the retention of important aspects of the Commission system in Mobile.3/

3/ The appellants are free, for example, to establish a triumvirate of elected executive officials and to permit a member of the single-member district council to also run for and hold such an executive position.

Neither did the decisions below adopt a "tort" standard of intent, as claimed by appellants.J.S., pp. 7, 13. The district court did hold "that the present dilution of black Mobilians is a natural and foreseeable consequent of the at-large system imposed in 1911," and "that the evidence supports the tort standard as advocated by the plaintiffs." J.S., pp. 29b-30b. But the opinion explicitly stated: "However, this court prefers not to base its decision on this theory," J.S., p. 30b. Rather, the trial judge based his finding of purposeful discrimination on direct evidence of the legislature's racial motives. J.S., pp. 29b-31b. The court of appeals affirmed on this ground as well. J.S., p. 141.

The courts below adopted no general rule about the validity of at-large elections or the Commission form of government, but merely determined on the specific evidence before them that respondents had established discriminatory intent. Such a finding, as the disposition of the companion cases shows, does not purport to dictate the outcome of other litigation regarding the use of at-large elections or the Commission form of government, and affirmance by

this Court of that factual finding on the record in this particular case will not establish any new legal principle. Under these circumstances the Court should adhere to the "two court rule" and decline to review that factual finding.

2. Whether the diluting effect of Mobile's at-large elections was sufficient by itself to warrant relief under White v. Regester is only an alternative ground for affirming the decision below. In the court of appeals only one judge, specially concurring, found liability on that basis, and appellants do not purport to find in his one-sentence concurring opinion a substantial ground for appeal. J.S., p. 71a. The district court concluded that the at-large plan, in addition to its unconstitutional purpose, also had an unconstitutional impact. But it is not the practice of this Court to grant plenary review to decide the conrrectness of independent alternative grounds available to support otherwise proper decisions.

Appellants assert that the court of appeals adopted a number of inappropriate rules of laws, but are able to point to no language in the opinion below incorporating these alleged rules

Appellants contend, for example, that the Fifth Circuit in this case held "in effect" that the existence of racially polarized voting was of "controlling significance," yet concede that the rule actually articulated by the same panel in a companion case uses polarized voting "merely as the starting point for further constitutional analysis." J.S., p. 17. Appellants claim the court of appeals "effectively" required that electoral systems be so structured as to guarantee the election of minority candidates, J.S., pp. 6, 17, but in two companion cases the same panel declined to order the use of single-member districts which would have thus assisted minority candidates.[4/] Appellants advance a number of assertions regarding facts in this case relevent to White, urging, for example, that blacks in Mobile can participate in a meaningful way in the political process and that the all-white government there is fairly responsive to minority needs, J.S., pp. 7-8; the findings of the district court, however, were to the contrary on each of those issues, and those findings were

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4/ Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978).

not, and are not claimed to be, clearly erroneous.

The alternative ground available under White v. Regester and noted by the concurring opinion and the district court represents merely a routine application of White v. Regester as clarified by a long line of carefully considered appellate decisions.[5/] Appellants did not generally question in the court of appeals the established Fifth Circuit law in this area and did not assert that the principles of White v. Regester should not be applied to city elections. Appellants did argue below that White v. Regester had been modified by Washington v. Davis, 426 U.S. 229 (1976), and that an at-large election plan which had the effect of disen-

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5/ Thomasville Branch of the N.A.A.C.P. v. Thomas County, 571 F.2d 257 (5th Cir. 1978); Kirksey v. Broad of Supervisors, 554 F.2d 139 (5th Cir.), cert. denied, _____ U.S. _____ (1977); Panior v. Iberville Parish School Bd., 536 F.2d 101 (5th Cir. 1976); Ferguson v. Winn Parish Police Jury, 528 F.2d 592 (5th Cir. 1976); Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975); Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974); Moore v. Leflore County Board of Election Commissioners, 502 F.2d 621 (5th Cir. 1974); Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir.), cert denied 407 U.S. 925 (1972).

franchising blacks was nonetheless valid unless motivated by a discriminatory purpose; on that issue, however, appellants prevailed [6/] and they do not seek review of that aspect of the decision below.

3. The Jurisdictional Statement contains a question regarding the remedy fashioned by the district court, and the history of that issue is delineated, but the matter is not discussed at length in the body of the Jurisdictional Statement. J.S., pp. 4, 15-16.

The appropriateness of the remedy was properly analyzed by the court of appeals. J.S., pp. 15a-17a. Appellants inexplicably refused in the district court to offer any plan for the conduct of elections or the creation of single-member districts. Under that cicumstance it was the obligation "of the federal court to devise and impose a reapportionment plan." Wise v. Lipscomb, 46 U.S.L.W. 4777, 4779 (1978). Manifestly some alteration in Mobile's method of election was required to remedy the proven violation, and since the

---

6/ Appellants maintain that, for the reasons stated in the concurring opinion of Judge Wisdom in Nevett, the court of appeals decision was erroneous in this regard. Were probable jurisdiction noted we would so argue.

plan was ordered by the district court it was required to prefer single-member districts. Id. Appellants' recalcitrant refusal to assist in the framing of a decree forced the district court to resolve the details of a plan which it would have preferred to leave to state or local authorities; for this reason the court's decree expressly provides that state and local officials retain their authority to alter the plan adopted by the court in any respect other than the reinstitution of at-large seats. J.S.; pp. 2d-3d.

Appellants imply that the trial court abused its discretion by formulating a "strong mayor" plan (based on a synthesis of special statutes governing Birmingham and Montgomery) instead of utilizing the "weak mayor" option offered by the general Alabama law. J.S., p. 15, n.17. In fact, however, it was at the instance of appellants' counsel, who during and after trial pleaded with the court not to employ the "weak mayor" form as a remedy, that the district judge appointed a blue-ribbon panel to develop an interim "strong mayor" plan. Although the Jurisdictional Statement suggests the district

judge altered Mobile's non-partisan method of electing city official, J.S., p. 22, n.26, in fact the judge retained that practice. J.S., pp. 7d-9d. Appellants did not attack this remedy in the court of appeals, except to argue that no remedy was possible because at-large elections are an integral part of commission government. In any event, the appellants, having failed in 1976 to offer the district court any proposed remedial plan, cannot now complain in this Court about the details of the plan actually adopted.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD STILL
601 Title Building
Birmingham, Alabama 35203

J.U. BLACKSHER
LARRY MENEFFEE
1407 Davis Avenue
Mobile, Alabama 36603

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York

Counsel for Appellees

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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IN THE

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SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

EDWARD STILL
601 Title Building
Birmingham, Alabama 35203

J. U. BLACKSHER
LARRY MENEFFEE
1407 Davis Avenue
Mobile, Alabama 36603

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Appellees

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Appellees submit this supplemental brief with regard to a new issue first raised by appellants' Opposition to Motion to Affirm: whether the dilution rule of *White* v. *Regester*, 412 U.S. 755 (1973), should be applied to city elections.

Whatever the merits of that question, it simply is not presented by the instant case. The decision of the Fifth Circuit rests, not on a finding of dilution in violation of *White*, but on a finding of intentional discrimination in violation of *Gomillion* v. *Lightfoot*, 364 U.S. 399 (1960). The nature of the opinion below was detailed in our Motion to Affirm, pp. 8-14, and appellants' in their Opposition do not dispute our characterization of the Fifth Circuit's decision. Accordingly even if this Court were to hold *White* inapplicable to city elections, that would not require or permit reversal of the decision below.

This new contention, moreover, was never raised by appellants in the extensive litigation in the District Court and Court of Appeals, and is not included in the Jurisdictional Statement. Although the meaning and application of *White* was repeatedly and exhaustively briefed below, at no time prior to the filing of their Opposition to Motion to Affirm did appellants contend that *White* should not be applied to city elections. In support of this new contention appellants offer regarding the role of elected city officials a variety of factual assertions which were not presented to or addressed by the courts below and on which the record in this case is silent. Since this issue is not a jurisdictional one, and since appellants failed to raise or preserve it below, it is not properly before this Court. *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U.S. 274, 278-81 (1977).

For the above reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD STILL
601 Title Building
Birmingham, Alabama 35203

J. U. BLACKSHER
LARRY MENEFFEE
1407 Davis Avenue
Mobile, Alabama 36603

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Appellees

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OPPOSITION TO MOTION TO AFFIRM

Of Counsel:

Hand, Arendall, Bedsole,
Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601

Legal Department of the
City of Mobile
Mobile, Alabama 36602

Rhyne & Rhyne
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

C. B. ARENDALL, JR.
WILLIAM C. TIDWELL, III
TRAVIS M. BEDSOLE, JR.
Post Office Box 123
Mobile, Alabama 36601

FRED G. COLLINS
City Attorney, City Hall
Mobile, Alabama 36602

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR
MARTIN W. MATZEN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for Appellants

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As Appellants' Jurisdictional Statement points out, this case is the first to come before this Court in which an entire form of local government, not merely the manner of its election, has been struck down by the Federal Courts under the constitutional rubric of "dilution" of black votes. It is also the first case to require this Court to decide whether "relevant constitutional distinctions may be drawn in this [dilution] area between a state legislature and a municipal government." *Wise v. Lipscomb*, ____ U.S. ____ , 46 U.S.L.W. 4777, 4780 (June 22, 1978) (separate opinion). This aspect of *Lipscomb* was not addressed in Appellees'

Motion to Affirm (August 3, 1978). This Court cannot dispose of this case properly without evaluating the distinction between state governments and local governments, adumbrated in *Lipscomb*.

The dilution rule made applicable to state legislative elections by *White v. Regester*, 412 U.S. 755, should not be carelessly transplanted into the local government context. There are a host of salient differences and reasons militating more greatly in favor of municipal at-large electoral systems, several of which are highlighted in this litigation.

The essence of a state legislature is the representation of geographically narrow constituencies in the formulation of broad, statewide policy. See *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166. The generality of the policy declaration, and the absence of a need for implementation by the legislature, make the state legislature perfectly adapted to continual reapportionment and coalition politics. Intervention by Federal Courts to rearrange the constituencies of the individual members of the legislative collective, when the Constitution requires, causes no undue dislocation in the duties or operation of the legislative institution.

This is not always the case, however, with the local governments which implement the broad statewide policy. It is especially not the case where the Federal Court's remedy changes not only constituency but the very form of the local government, as does the remedy in this case.

Fundamentally, the central purpose served by at-large elections is more important to local governing boards than to state legislatures. Thus, it has been observed:

> "[T]he purposes served by multimember districts are less apparent in *Regester* than in *Zimmer*.[4] The

[1]In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub. nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, the Fifth Circuit extrapolated from *Regester* and extended the dilution rule to local governments. This Court affirmed "without approval of the constitutional views" enunciated by the Fifth Circuit. 424 U.S. at 638.

(continued)

> districtwide perspective and allegiance which result from representatives being elected at-large, and which enhance their ability to deal with districtwide problems, would seem more useful in a public body with responsibility only for the district than in a statewide legislature." *Note*, 87 Harv. L. Rev. 1851, 1857 (1974).

It is consistent with this analysis that use of multimember districts in state legislative apportionment has long been on the decline.[2] Silva, *Compared Values Of The Single- And The Multi-Member Legislative District*, 17 West. Polit. Q. 504-505 (1964); Dixon & Hatheway, *The Seminal Issue In State Constitutional Revision: Reapportionment Method And Standards*, 10 Wm. & Mary L. Rev. 888, 903 (1969). With respect to city government, exactly the opposite is true. The proportion of cities using at-large elections has grown markedly since the turn of the century and from 53 percent in 1940 to 62 percent in the middle 1960's to more than 67 percent in 1972. Jewell, *Local Systems of Representation:*

(footnote continued from preceding page)

[2]The autonomy of most local governments being limited by State law, councils and commissions often must seek approval of their decisions in the State legislatures. The City of Mobile, for example, does not have home rule under Alabama law. The District Court below took notice of the local legislation procedures employed in the Alabama legislature, which consists of a 35 single-member districted Senate and a 105 single-member districted House.

Thus, in a real sense, policy for the City of Mobile is made by a combination of the best of both patterns: single-member districts for the supervisory State legislature, and commission form, necessarily at-large, for the city government.

In this way, the distinctions perceived in *Lipscomb, supra*, can coexist.

Political Consequences And Judicial Choices, 36 Geo. Wash. L. Rev. 790, 799 (1968); International City Management Association, *Municipal Year Book* Table 3/15 (1972).

Much of the impetus of this trend is undoubtedly provided by adoptions of the two reform models of local government: the commission form and its successor, council-manager. Aside from the shared premise of at-large elections, the common ground of these two forms is non-partisan elections[3] — another extremely important distinction from the state legislative circumstance confronting the Court in *Regester.* Where parties determine who may run for office, there is a potential for the exclusion of minority-supported candidates from the ballot which cancels out or minimizes minority voting strength.

That potential for exclusion is removed where elections are truly non-partisan and where no other white-dominated interest groups control the slating process. While there are some only nominally non-partisan cities where candidates are nevertheless supported by political parties or by various influential groups, it is most common for a "free for all" pattern to prevail, in which neither parties nor slates of candidates are important. C. Adrian & C. Press, *Governing Urban America* 99-100 (4th Ed. 1972); R. Lineberry & I. Sharkansky, *Urban Politics and Public Policy* 88 (1971).

In Mobile, parties play no role, and there is but one important slating organization — a black group which endorsed each of the winners in the last contested city elections. (J.S. 10-12). In such a situation, it is an absolute

[3]The great majority (76 per cent) of city governments in the country are non-partisan. Only the mayor-council form, decreed by the District Court below, shows a substantial percentage (36 per cent) of partisan electoral systems. International City Management Association, *Municipal Year Book* 69 (1976).

imperative that, as Appellees concede, all "candidates actively seek black votes as well as white votes. . ." (Motion to Affirm at 6).

Political scientists concur that the most outstanding feature of the commission form is the dual role of the commissioners — each of them serves individually as the head of an executive department while collectively they serve as the policy-making council for the city. In other words, unlike the various mayor-council structures and unlike any state governmental scheme, there is no separation of powers.

The theory, and in Mobile, the practice[4] of this is that the real implementer of policy is directly and immediately accessible to citizens with input or complaints about the performance of city government. There are no intermediate steps. The legislator is not compelled to do extensive casework to locate and persuade the responsible administrator of the value of his constituent's message. Whereas in a state legislature single-member districts may be necessary to make constituencies small enough so that all the casework can be done, the very structure of Mobile's government is designed to address that need.

The council-manager form is based on an almost antithetical idea of complete insulation of the manager from electoral politics. Appellants do not argue that one or the other is best for all times and all communities, only that each serves important policy considerations and has characteristics quite distinct from the state legislative scenario. Both reform models depend on at-large elections, which

[4]The testimony of Plaintiffs' own witnesses established that one or more Commissioners were personally available to hear black citizens' needs and grievances, and that this access had tangible impact on city government performance. (Tr. 433-34, 572-73, 583, 621-25).

under the law of this case (a rule purportedly derived from the principles set down in *Regester*) are unconstitutional in any city where racially polarized voting is found from an abstruse statistical demonstation and blacks are not numerous enough to elect blacks to office.

Probable jurisdiction should be noted.

Respectfully submitted,

C. B. ARENDALL, JR.
WILLIAM C. TIDWELL, III
TRAVIS M. BEDSOLE, JR.
Post Office Box 123
Mobile, Alabama 36601

FRED G. COLLINS
City Attorney
City Hall
Mobile, Alabama 36602

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR
MARTIN W. MATZEN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for Appellants

Of Counsel:

Hand, Arendall, Bedsole,
Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601

Legal Department of the
City of Mobile
Mobile, Alabama 36602

Rhyne & Rhyne
1000 Connecticut Avenue, N. W.
Suite 800
Washington, D. C. 20036

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C.B. ARENDALL, JR.
WILLIAM C. TIDWELL, III
TRAVIS M. BEDSOLE, JR.
Post Office Box 123
Mobile, Alabama 36601

FRED G. COLLINS
City Attorney, City Hall
Mobile, Alabama 36602

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR
MARTIN W. MATZEN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for appellants

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 571 F.2d 238, and that of the District Court is reported at 423 F. Supp. 384. Those Opinions are reproduced in Appendices A and B to the Jurisdictional Statement, respectively. The Judgment of the District Court, entered on October 22, 1976, and the Order of the District Court, entered March 9, 1977, setting forth the new City Charter imposed by that

Court, and constructing an entire administrative structure to replace the present admixture of legislative and administrative functions in Mobile's 3-member Commission Government, are both unreported. Those Orders are reproduced in Appendices C and D to the Jurisdictional Statement.

On October 3, 1978, the District Court entered a stay of elections, which is reproduced at App. 37. On October 16, 1978, this Court, App. 38, denied Appellees' motion to vacate that stay. The effect of these last orders was to preserve *pendente lite* Mobile's Commission form of government which has existed without substantial change since 1911.

JURISDICTION

The jurisdiction of this Court to review this decision by appeal is conferred by 28 U.S.C. §1254(2); the only issues in this case are constitutional in nature since there has been no change to Mobile's at-large election of Commissioners cognizable under the Voting Rights Act, 42 U.S.C. §1973 *et seq.*

The judgment of the District Court was entered October 22, 1976, and that Court's "remedial" Order creating an entirely new legislative, executive and administrative structure was entered March 9, 1977. Notice of Appeal to the Fifth Circuit was filed on March 18, 1977. The judgment of the Court of Appeals was entered March 29, 1978. (The Fifth Circuit docket entries are reproduced, App. 10). Notice of Appeal to this Court was filed on June 19, 1978. The Jurisdictional Statement was filed on June 27, 1978, and probable jurisdiction was noted October 2, 1978.

STATUTES INVOLVED

This case involves the constitutionality under the Fourteenth and Fifteenth Amendments, of Alabama Act No. 281 (1911), as locally implemented by a vote of the electorate in 1911 providing a Commission Government for the City of Mobile.[1]

QUESTION PRESENTED

1. Whether the Commission form of Government designed to make the head of each administrative department responsible directly to each of the City's voters (thereby to eliminate corruption and ward-heeling), and thus necessarily elected at-large, violates the Federal Constitution because this form of government cannot guarantee that one or more of the Commissioners will be elected solely by black residents who comprise one-third of the City's population.

   a. Whether the holdings of the Courts below conflict with the constitutional principles set forth by this Court in *Whitcomb v. Chavis*, 403 U.S. 124, *White v. Regester*, 412 U.S. 755 (no constitutional right to proportional representation by race), *Washington v. Davis*, 426 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (mere passive knowledge of discriminatory effect of *status quo* insufficient proof of discriminatory intent).

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[1]This statute, as amended, is now codified at Code of Alabama 1975 §§11-44-70 through 11-44-105 (1977), set forth in pertinent part in Appendix F to the Jurisdictional Statement. Also involved is Alabama Act No. 823 (1965), set forth in Appendix G to the Jurisdictional Statement.

b. Whether even discriminatory effect has been proved in this case where, as the Courts below found, no outstanding black citizen has attempted to mount a serious candidacy for the office of Commissioner.
c. Whether the Courts below, in disregarding active and effective black voter and leader participation in Mobile's at-large elections as irrelevant, have erroneously expanded the constitutional protection of unfettered participation by all races in the electoral process, to a rule of constitutional law requiring the result of the electoral process to be proportional representation by race.

STATEMENT

I.

INTRODUCTION

The City of Mobile operates presently, and has operated since 1911, under the Commission form of government designed to combine in the Commissioners both legislative and administrative functions, and to make each functionally specialized Commissioner accountable equally to each voter, black and white, in the City. The challenge is solely to the at-large feature necessary to Commission form. The Order (Juris. St. 1d-63d) entered by the District Court and affirmed by the Court of Appeals disestablishes this form of government and substitutes two features: (1) the remedial Order guarantees that some City legislators will be accountable only to voters in black-majority

districts while other City legislators will be accountable only in white majority districts; and (2) the Order prescribes in the most minute detail[2] a reorganization of the administrative structure under which the City must operate henceforth. The predicate for that Order and its affirmance was that the existing Commission government with its integral at-large elections could not guarantee a black candidate for Commissioner electoral victory in a City whose population is some thirty-five percent black. It is to that predicate, asserted under the Fourteenth and Fifteenth Amendments, that this appeal principally is directed.[3]

II.

THE HISTORICAL CONTEXT OF MOBILE'S CHOICE OF COMMISSION GOVERNMENT

The City of Mobile adopted the Commission form of government in 1911. Mobile was one of some 500 local governments to do so in the first quarter of this century.[4]

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[2]The District Court's Order establishes a "strong mayor-council" plan, with a 9-member council elected by single-member districts. The Court-ordered plan constitutes a new City charter, edicting not only the form of government and electoral system, but such matters as salaries and budget procedures. (Juris. St. 12d-13d, 25d, 30d-41d).

[3]Therefore, inapposite are such remedy cases as *Connor v. Finch*, 431 U.S. 407, and *Kirksey v. Board of Supervisors*, 554 F.2d 139(5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977).

[4]Historians attribute the rise of the Commission form to an interest in businesslike government and an aversion to the ward politics and the corruption that often attended aldermanic or councilmanic systems in those times. Commission government is founded upon two funda-

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The Court of Appeals held that the City's choice of at-large government was 'neutral at its inception." 571 F.2d at 246 (Juris. St. 13a).[5]

Mobile has made no substantial change[6] in its governmental system since that time.

III.

THE CURRENT SCENE IN MOBILE ELECTIONS: UNIMPEDED MINORITY VOTING, ENDORSING AND INFLUENCING THE RESULTS

The deplorable past of disenfranchisement has given way to a present in which there are no obstacles to

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mental principles. First, its structure is designed to foster corporate-management-type accountability through the creation of clear lines of known public responsibility for specific aspects of governmental affairs. Second, each voter is to be a constituent of each Commissioner, thereby eliminating any institutional incentives to logrolling.

[5] Blacks were not a political force in Alabama in 1911—they as well as most poor whites, had been effectively disenfranchised by a State constitutional provision of 1901. The adoption of Commission government was not directed toward the reduction of any black voting power. There was then no black voting power to be reduced.

[6] In 1965, the Alabama Legislature passed a law assigning specific duties to each of the three Commission posts (Public Works Commissioner, Public Safety Commissioner and Finance Commissioner). The previous practice, codified by a 1940 statute, had been that the allocation of duties was determined by a majority of the Commission. Each Commissioner continued to stand election at-large, before all the voters of the City. The Court of Appeals deemed the 1965 legislation originated by Commissioner Langan (Tr. 330-32) designating Commissioners' functions supportive of a conclusion of impermissible racial purpose in the maintenance since 1911 of the at-large feature challenged in this case. The District Court had considered the 1965 act to be salutary in identifying for the voters the functional specialization to which each Commissioner aspired. 423 F. Supp. at 394 n. 9 (Juris. St. 21b).

equal electoral voter participation and in which black voters and groups are a pivotal, frequently decisive, force in Mobile elections.

It was undisputed below that every phase of the political process of registration, voting, qualification and candidacy for the Mobile City Commission is as open to blacks as to whites. 423 F. Supp. at 387, 399 (Juris. St. 7b, 35b).[7]

[7] Beneath this "first blush" neutrality, the District Court found that "[o]ne indication that local electoral processes are not equally open is the fact that no black has ever been elected to the at-large City Commission." 423 F. Supp. at 387-88 (Juris. St. 7b). Drawing upon statistical evidence that voting in the City has been polarized along racial lines (423 F. Supp. at 388-89; Juris. St. 7b-11b), the Court found:

> "Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a city-wide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life." 423 F. Supp. at 388 (Juris. St. 10b).

But in Mobile, no black candidate for the Commission has ever suffered defeat as a result of at-large voting. As the District Court recognized, the only three blacks to have sought election to the Commission "were young, inexperienced, and mounted extremely limited campaigns." 423 F. Supp. at 388 (Juris. St. 8b). These candidates were of such limited appeal even to black voters that they admittedly failed even to carry predominantly black census wards (Tr. 175; App. 68).

In the view of the District Court, this failure of qualified black candidates even to try the political process was attributable to "discouragement" at their perceived chances for victory in at-large City elections. 423 F. Supp. at 389 (Juris. St. 11b). The District Court did not address these undisputed facts of record—often adduced through Plaintiffs' own witnesses—which clearly demonstrate that blacks do participate actively and effectively in City politics, not as Commissioners but as Commission "makers":

> 1. Commission candidates actively seek black votes, and the endorsement of the Non-Partisan Voters League ("NPVL"), the

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This is not a case like *White v. Regester*, 412 U.S. 755, 766-67, where, despite the lack of formal prohibitions on registration or voting, minorities were effectively excluded by white-dominated political party structures or slating organizations which discourage or ignore minority input. Mobile's elections are conducted upon a wholly non-partisan basis.[8] There is but one important slating organization—a black organization.

A. The Sixteen Year Tenure Of "A Staunch Friend of the Blacks"

The tenure of former Commissioner Joseph Langan is unassailable evidence of the electoral power of Mobile blacks. Langan, a white former State Senator whose ardent opposition to literacy tests, segregated buses and unequal pay for black and white school teachers had resulted in his defeat in a State Senate contest in 1951, was first elected to the City Commission in 1953. Throughout the ensuing sixteen years he campaigned for black voter support on the strength of his advocacy for the equalization of services through the paving of streets, installation of water and sewer facilities and dedication of parks in black neighborhoods. He

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City's principal black political organization (Tr. 264, 320-22, 412-414, 539-40, 752, 824, 927, 1141; App. 121-23, 140-42, 185-86, 262, 307, 397, 509).

2. In the City's most recent elections, held in 1973, two of the three present Commissioners ran and won with the endorsement of the NPVL. The third Commissioner ran unopposed.

3. One of the present Commissioners was elected on the strength of the black "swing" vote (Tr. 413-14; App. 141-42).

[8]In this respect Mobile is like many reform local governments (Commission and Council-Manager) and unlike all State legislative systems.

appointed black citizens to important posts, including a controversial activist (John LeFlore) to the City Housing Board.

Langan was openly and widely acknowledged to be, in the District Court's words, "a staunch friend of the blacks." (Tr. 286). He was elected and re-elected four times.[9]

B. The Strength Of The Non-Partisan Voters League

The Langan victories were largely the product of the efforts of the only slating organization in Mobile, the Non-Partisan Voters League (NPVL), a local branch of the National Association for the Advancement of Colored People. A black State legislator testified that "because of the credibility and strength that [the NPVL] had," it was capable of producing a 90% level of support in the black community for the candidate of its choice. Langan testified that "whoever's name was on [the NPVL endorsement flyer] within the black community obtained an outstanding vote." (Tr. 322; App. 123).

An organization with so much electoral influence amongst so sizeable a group of voters could not be ignored by candidates or by incumbents. Each candidate[10] for the City Commission in 1973 sought the NPVL's

[9]Langan's analysis of his unsuccessful 1969 bid for a fifth consecutive term attributed his defeat to a reduced black turnout occasioned by intimidation from a militant black group advocating a total boycott of the political system. (Tr. 299, 304; App. 111, 115).

[10]The Rev. Robert L. Hope, the President of the NPVL, testified on cross examination (Tr. 413-14; App. 141-42) to the "notable success" the NPVL enjoyed in electing candidates it supported:

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endorsement. The two[11] who received it were the winners[12] of the elections.

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Q Isn't it a fact, Reverend Hope, in the course of your connection with the league, its endorsement has been actively sought by candidates over the years that you have been connected with it?
A Yes, sir. Definitely so. I explained that to start with.
Q And wasn't that true in the last City Commission race in 1973?
A Yes, sir.
Q Every candidate in the race sought your endorsement, didn't they?
A Yes, sir.

* * * * * *

Q Let me ask you this. Didn't the black vote in effect put Gary Greenough [one of three current Mobile City Commissioners elected in 1973] in office?
A I wouldn't say the black vote alone, sir.

THE COURT: Was it the difference?

A I believe so.

THE COURT: All right.

On redirect, Rev. Hope attested (Tr. 417-18; App. 143-44) to the practical post-election results of such clout:

Q Reverend Hope, in answering [counsel for Mobile's] questions, did you mean to say that every candidate that the Non-Partisan Voters League has endorsed has turned out to represent the interests of the black community fairly?
A In recent years they have.
Q How recent do you mean when you say recent years?
A In this last election and maybe the election prior. I think, in my opinion, they have done a very good job in carrying out their obligations toward trying to be fair to all people.
Q Is that your opinion or the opinion of the entire League?
A Yes, that is the opinion—that is what I am trying to speak for. They feel that the candidates they have elected in recent years have done a very good job along that line.

[11]Commissioners Greenough and Mims received NPVL support. Commissioner Doyle was unopposed. The NPVL endorsed Greenough and Mims over black candidates. See note 7, *supra*.

[12]Mims had also sought and received NPVL endorsement in his successful 1969 re-election campaign.

IV.

THE PREMISES OF THE DECISIONS BELOW

The opinions of the Courts below attempted to address the traditional Fifth Circuit analysis of voting dilution cases, in light of the foregoing realities of Mobile electoral politics: there is no obstacle to full electoral participation.

The Court of Appeals took as an indication of lack of access to the political process the fact that "[n]o black had achieved election to the City Commission due, in part, to racially polarized voting of an acute nature." 571 F.2d at 243 (Juris. St. 7a).[13] No outstanding black citizen has ever attempted to mount a serious candidacy for the City Commission. Therefore, the District Court erroneously applied the traditional statistical analyses of polarized voting[14] not to City elections, but to elections in

[13]The District Court described the phenomenon of polarized voting, 423 F. Supp. at 387-88 (Juris. St. 7b-8b), and also described the quantification of the phenomenon, 423 F. Supp. at 389 (Juris. St. 9b).

[14]The theory is that an at-large system "submerges", *Nevett v. Sides*, 571 F.2d 209, 216 (5th Cir. 1978), black voting preferences by causing the defeat at-large of a candidate who could carry a (black majority) district. Proof of the theory requires evidence of a candidate expressing black desires who could (quantified as the racially polarized vote) carry a district. *Able* black candidates can carry not only a district but a City as well. They are being elected in at-large elections across the country, regardless of the percentage of black voting population. Black mayors have recently been elected in cities where blacks are in the minority, as, for example, in Detroit, Michigan (39.4%), Newark, New Jersey (48.6%), East Orange, New Jersey (47.0%), Berkeley, California (20.2%), Richmond, California (31.5%), Los Angeles, California (18.0%), Atlanta, Georgia (47.3%), and Raleigh, North Carolina (21.3%). *National Roster of Black Elected Officials*, Joint Center for Political Studies (1974).

The Hon. Henry Marsh, the current Mayor of Richmond, Virginia (42% black population), was first elected at-large to that City's Council

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other jurisdictions: County Commission, County School Board and State legislative districts. 423 F. Supp. at 388-389 (Juris. St. 8b-9b).

Neither Court below in their clearly erroneous findings based upon the facts irrelevant to Mobile City elections, addressed the fact that these elections upon which the Courts founded their decisions were from geographically and demographically different constituencies; *a fortiori*, neither Court addressed the governmental distinctions between State legislative districts and local governments, adumbrated in *Wise v. Lipscomb*, ___ U.S. ___, 98 S. Ct. 2493, 2502 (separate opinion of Rehnquist, J.).

In order to discuss City elections at all, the District Court was constrained to compare the votes received, not by a white and a black candidate, but by two white candidates. Thus, the Court was required by its own analysis and by the logic of statistics to find one of the white candidates (*i.e.* Langan) a surrogate black. The Court's characterization of campaign tactics and issues was

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in 1966, also a time when only a minority of the population was black.

The Hon. Ernest Morial was elected Mayor of New Orleans, Louisiana, in 1978. New Orleans' population is 45% black, while only 35% of its registered voters are black. *Beer v. United States*, 425 U.S. 130, 134.

Plaintiffs' witness Roberts, an Alabama State Senator, testified that in Birmingham, which is "most comparable with Mobile," (Tr. 738; App. __), black candidates had won two at-large seats on the City Council. A recent study of southern politics found that 37 of the South's 46 largest cities employed solely at-large elections, and black officials had been elected in 18. D. Campbell & J. Feagin, *Black Politics in the South: A Descriptive Analysis*, 37 Journal of Politics 129, 143-45 (1975).

The only 3 black candidates who ever have run for Mobile City Commissioner could not carry even a black majority district. The candidate who could (Langan), whose vote was racially polarized, also won elections at-large.

accompanied by a similarly unsubstantiated psychoanalysis of the voters themselves as involved in a white "backlash." 423 F. Supp. at 388-89 (Juris. St. 7b-10b).

Finally in its treatment of electoral access and participation, the Court of Appeals concluded that a prerequisite to a violation of either the Fourteenth or the Fifteenth Amendments is proof of racially discriminatory intent. 571 F.2d at 245 (Juris. St. 12a).

Finding no discriminatory intent in the adoption in 1911 of the at-large Commission form, the Court held that the form was discriminatorily maintained.[15]

To evidence the requirement that maintenance of the at-large system be intended with discriminatory animus,[16] the Court of Appeals cited maintaining inaction, not by the City Commissioners, but by the Alabama Legislature.[17]

[15]The Court of Appeals clearly relied on a theory of discriminatory maintenance. 571 F.2d at 245-46 (Juris. St. 13a-15a). Nothing in that opinion conforms to Appellees' characterization (Motion to Affirm 8) of the case as governed by *Gomillion v. Lightfoot*, 364 U.S. 339, a case involving a stark electoral change. The change declared unconstitutional in *Gomillion* would today be submissible under §5 of the Voting Rights Act, 42 U.S.C. §1973d, and the City put properly to its proof in justification. See also, *City of Richmond v. United States*, 422 U.S. 358.

The only actions cited by the Court of Appeals to show the Commissioners maintaining their form of government (as opposed to performing their administrative duties under it) were these two: (1) the formalization in 1965 of the prior practice of giving functional specialization (finance, public works, public safety) to the Commissioners and (2) the submission of this formalization to the Attorney General. 571 F.2d at 246 (Juris. St. 14a). This formalization did not alter the at-large feature of the Commission form, extant since 1911.

[16]*Nevett v. Sides*, 571 F.2d 209, 217 (5th Cir. 1978).

[17]571 F.2d at 247 (Juris. St. 14a). The Alabama Legislature itself is single-member districted. 423 F. Supp. at 389 (Juris. St. 10b). The District Court attached substantial importance to the Court-ordered reapportionment of the Legislature in altering the at-large structure of local jurisdictions neighboring Mobile. 423 F. Supp. at 397 (Juris. St. 30b).

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A factor considered by the Fifth Circuit and its District Courts in assessing the efficacy of black voter participation is the responsiveness of white incumbents to black needs, not on the electoral stump, but at City Hall after election day.

The most recent analysis of the relevance of responsiveness evidence viewed evidence of a lack of administrative responsiveness as helpful to a voting challenge in explaining the existence of electoral obstacles to black electoral access:

> "The *Zimmer* [*v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636] criteria go to the issue of intentional discrimination, first of all, because they would be irrelevant if motivation were not an issue. If, as the appellants suggest, it is sufficient that 'the combination of a legal system (at-large election) with the minority status of blacks and a societal system (racially polarized voting) has the effect of diluting black voting strength' then of what relevance is the accessibility of political processes to blacks, the responsiveness of the city council to the needs of blacks, the weight of the state policy behind the at-large plan, or the existence of past discrimination in the electoral process? Moreover, the Supreme Court has squarely rejected the contention that at-large elections are unconstitutional merely because fewer minority candidates are elected, due to polarized voting, than would correspond to the minority's portion of the district population. *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858,

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Appellants already have suggested the consistency—both constitutionally and under the tenets of political science—of a districted State Legislature and a variety of forms, including at-large Commission or Council-Manager forms, of local government. Oppos. to Mot. to Affirm 2-6.

29 L.Ed. 2d 363 (1971). It is clear, therefore, that mere disproportionate effects are not enough to invalidate an at-large plan and hence that the *Zimmer* criteria purport to establish something more.

> "Perhaps the most useful approach to analyzing the *Zimmer* criteria as they relate to the existence of intentional discrimination is to assume that an at-large scheme is being used as a vehicle for achieving the constitutionally prohibited end. The objective of such a scheme would be to prevent a group from effectively participating in elections so that the governing body need not respond to the group's needs. This objective would be achieved by insuring that a cohesive group remains a minority in the voting population, thus preventing that group from electing minority representatives or from holding nonminority representatives accountable."

Nevett v. Sides (*Nevett II*), 571 F.2d 209, 222 (5th Cir. 1978).[18]

[18]The *Nevett II* panel continued, applying its analysis to this, a companion, case:

> "Where evidence of discriminatory intent is lacking in the enacting processes, the *Zimmer* criteria become acutely relevant. They may demonstrate as in *Kirksey*, that the neutral plan is an 'instrumentality for carrying forward patterns of purposeful and intentional discrimination.' 554 F.2d at 147. In *Kirksey*, the plan was recently formulated, and it perpetuated past intentional discrimination. A remotely enacted plan, such as the 1909 plan in this case, that was adopted without racial motivations may become a vehicle for the exclusion of meaningful minority input because intervening circumstances cause the plan to work that way. When the more blatant obstacles to black access are struck down, such an at-large plan may operate to devalue black participation so as to allow representatives to ignore black needs. Where the plan is maintained with the purpose of excluding minority input, the necessary intent is established, and the plan is unconstitutional. We so hold today in *Bolden v. City of Mobile*."

571 F.2d at 222.

By this analysis, incumbent responsiveness evidence bears on the issue in a voting case only after some electoral obstacle to black electoral participation has been shown to exist presently. Here no electoral obstacle to black voters was proven.

The record in this case shows that the performance in office of white incumbents is not perfect. But the record is clear that the trend in incumbent responsiveness is improving: blacks are sharing more of municipal jobs, appointments and services than they did a few years ago, and many more than they did many years ago.[19]

Structurally, the Commission form of government is most likely to encourage incumbent responsiveness.[20] Under this form, the administrators are elected and must defend their administrative performance in electoral campaigns. Moreover, Commissioners are, of constitutional necessity,[21] elected at-large; each commissioner (Finance, Public Works and Public Safety)[22] must therefore defend his balancing of needs and resources among all Mobilians, before the entire electorate.

[19]The Courts gave weight to evidence concerning municipal employment, appointments and services. The Courts did not credit the existence of independent remedies for any alleged inadequacies in these areas. *Cf. Washington v. Davis*, 426 U.S. 229, 244 n. 12; *James v. Wallace*, 533 F.2d 963 (5th Cir. 1976); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972).

[20]The record reflects that it does in fact. In the uniform experience of Plaintiffs' own witnesses, one or more Commissioners was personally available to hear black needs or grievances; and, more often than not, this access produced positive tangible results—street lighting, paving, sewers and sidewalks. (Tr. 433-34, 572-73, 583, 621-25; App. 148-49, 200-01, 204, 215-19).

[21]The District Court below so concluded. 423 F. Supp. at 387, 402 n. 19 (Juris. St. 5b, 40b).

[22]423 F. Supp. at 387 (Juris. St. 5b).

At present the Commissioners must take a City-wide view on service requests. They can use taxes paid by the affluent to improve services for those less fortunate economically. But under the District Court's Order of 3 or perhaps 4 out of 9 Councilmen representing blacks it must be assumed (based on the same polarized vote used here to find unconstitutionality) that black Councilmen will not be able to command this City-wide support on expenditures for poor blacks so essential under the present Commission system of government. It is reasonable to conclude the white members of the Council (from racially homogeneous districts) will be less responsive to black requests. It is therefore reasonable to assume blacks will get what their taxes can pay for and thus lose more than they will gain from this governmental change.

SUMMARY OF ARGUMENT

This case is the first to come before this Court in which an entire form of government, not merely the manner of its election, has been struck down by the Federal courts under the constitutional rubric of "dilution" of black votes. Earlier cases have involved the validity of at-large or multimember districting in circumstances where the administrative form of government was equally able to continue under other electoral plans such as pure single-member districting. This distinguishes State legislatures from any municipal governments of the reform model (Commission and Council-Manager), to which at-large elections are integral. In *White v. Regester*, 412 U.S. 755, for example, this Court for the first time upheld the

disestablishment of multimember State legislative districts, in order to minimize both geographically and qualitatively the dilutive impact of such prohibited obstacles to black electoral participation as white slating organizations.

The instant case illustrates how far the "denial of [electoral] access" test in *White v. Regester* has been carried under the "dilution" banner: undisputed evidence of active and effective black participation in an electoral system concededly neutral on its face and free of formal impediments to blacks' registering, voting, and becoming candidates was here deemed constitutionally deficient "access to the political process" because black voters are not numerous enough to elect black officials in an at-large electorate found to be racially polarized. It is worth repeating that *no* able black has run for election as a Mobile Commissioner, so no one can justly conclude an election defect for such a candidate when able black candidates all over the Nation have won at-large elections even though blacks were a minority of the voters.

In effect, the Courts below have found a constitutional violation solely in the effect of racially polarized voting, contrary to *United Jewish Organizations v. Carey*, 430 U.S. 144, 166-67; and in so doing, they have effectively required that electoral systems (and here, the entire City administration) be so structured as to use racially polarized voting to guarantee the election of minority candidates, contrary to *White v. Regester, supra*, 412 U.S. at 765-66, and *Whitcomb v. Chavis, supra*, 403 U.S. at 153.

The Court of Appeals below recognized that a racially discriminatory intent must be shown to prove a violation of either the Fourteenth or Fifteenth Amendments; that intent motivates incumbents to maintain an

at-large electoral system to avoid the necessity of campaigning for black votes. *Nevett v. Sides*, 571 F.2d 209, 222 (5th Cir. 1978). In the face of evidence of plenary and effective black voter participation in the at-large system, the Courts below found compelling proof of racially discriminatory purpose in: (1) the failure to alter Mobile's existing governmental structure so as to guarantee proportional minority representation, coupled with (2) imputed legislative awareness that blacks might fare better electorally under elections by single-member district. Yet, if continuation of a neutral and reasonable governmental policy or action even with awareness of its racially disparate effect requires (without more, or, as here, in the face of contrary evidence of intent) the conclusion of invidious racial intent, this Court's decisions in *Washington v. Davis*, 426 U.S. 229, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, would necessarily have reached different outcomes.

The holdings below, if affirmed, portend the substantial erosion of local governments' necessary flexibility in structuring their electoral systems to satisfy their legitimate and racially neutral need for officials with the citywide perspective afforded by elections at-large.

ARGUMENT

I.

THE CONSTITUTIONAL RULE OF MANDATORY RACIAL VICTORY AND PROPORTIONAL REPRESENTATION BY RACE, FORMULATED BY THE COURTS BELOW, IS SQUARELY IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

This Court has rejected the proposition that "a white official represents his race and not the electorate as a whole and *cannot* represent black citizens." *Vollin v. Kimbel*, 519 F.2d 790, 791 (4th Cir. 1975) (emphasis original), citing *Dallas County v. Reese*, 421 U.S. 477, and *Dusch v. Davis*, 387 U.S. 112. *A fortiori*, no racial group has a constitutional right to elect minority officials "in proportion to its voting potential." *White v. Regester, supra*, 412 U.S. at 765; *Whitcomb v. Chavis, supra*, 403 U.S. at 153; *Beer v. United States*, 425 U.S. 130, 136 n. 8. The protected right is that of effective access to, and participation in, the electoral process. *Chavis, supra*, 403 U.S. at 149-155; *Regester, supra*, 412 U.S. at 766.

In both *Chavis* and *Regester*, this Court accepted the proposition that the use of multimember districts in a State legislative apportionment plan may be invalid if "used invidiously to cancel out or minimize the voting strength of racial groups," *Regester*, 412 U.S. at 765, but reached different results on the merits. Because this case represents the first occasion on which this Court is to consider the application of this "highly amorphous

theory" to a municipal form of government and at-large electoral system, *Wise v. Lipscomb*, __ U.S. __, 98 S.Ct. 2493, 2502, it is crucial to recognize that the focus in both cases was upon the relatively concrete facts of minority electoral access and participation, and *not* upon the hazy and problematic concept of "representation."[23]

The instant case raises the identical claim rejected in *Chavis*—that at-large electoral structures are constitutionally infirm where minority-sponsored candidates would prevail at the polls more often, or at least sometimes, under a single member districting scheme.[24] Plaintiffs there asserted that:

> "With single-member districting . . . the ghetto area would elect three members of the house and one senator, whereas under the present [multi-member] districting [black voters] 'have almost no political force or control over legislators because

[23]"Dilution occurs when an individual is deprived of his constitutional right of access to the political process, while representation refers to the claim (which has never been recognized as a constitutional right) that an individual is entitled to a voice in the legislature to further his particular interests. The lower courts, however, have not always recognized the important distinction between these two concepts. ***Because the Constitution provides a right to access, and not to representation, the inability of a racial minority to obtain legislative seats in proportion to its population cannot, in itself, constitute a constitutional violation." *Proportional Representation by Race*, 80 Mich. L. Rev. 820, 826 (1976).

[24]What was discredited in *Chavis* was not just the concept of racially *proportional* representation but rather the broader concept that *any* direct racial representation is a constitutional mandate. Even the District Court in *Chavis* had purported to so limit its ruling. 403 U.S. at 138.

the effect of their vote is cancelled out by other contrary interest groups' . . ."

403 U.S. at 129.

The *Chavis* Court explicitly rejected the notion that the Constitution is a guarantor of the outcome of elections.

The Court did, however, suggest a case in which, unlike *Chavis*, at-large elections might work a constitutionally impermissible exclusion:

> "We have discovered nothing in the record or the Court's findings indicating that Negroes were not allowed to register or vote, or choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. *Nor did the evidence purport to show or the court find that the inhabitants of the ghetto were regularly excluded from the slates of both major parties. . . It appears reasonably clear that . . . ghetto votes were critical to Democratic Party success [and therefore] it seems unlikely that the Democratic Party could afford to overlook the ghetto in slating its candidates.*" 403 U.S. at 149-50 (emphasis added).

Regester was exactly that egregious case, and only that case. The critical facts there were that a white-dominated organization (the Dallas Committee for Responsible Government) effectively in control of Democratic Party slating in Dallas County[25] had virtually

[25]The conclusion, 412 U.S. at 768, that multimember district elections impermissibly excluded Bexar County Mexican-Americans from the political process was based on the fact that Mexican-Americans had been barred from participation by the institutional obstacle of extremely restrictive registration rules (annual re-registration requirements which had replaced unconstitutional poll tax, and discriminatory prohibitions on assistance to illiterate voters) which were still in effect in the year the *Regester* litigation was brought. See *Breare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971); *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970).

never slated black candidates or candidates favored by the black community, and that incumbent legislators did not need black voters' support to win elections and therefore disdained it. It was this finding of an institutional barrier to black electoral participation which justified the holding that there was an "exclusion" of constitutional dimension.

Because the constitutionally protected right is *not* one of minority political victory,[26] it is not impermissibly infringed even where a minority finds itself consistently defeated at the polls by racially polarized voting. *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144, 166-67.

The District Court below in this case accepted the bootstrap argument of Plaintiffs, that the failure of prospective black candidates even to try the City's political processes was an "exclusion" or electoral obstacle of constitutional significance. The Court of Appeals uncritically accepted this substitution of "discouragement" for the more concrete barriers to black candidacy and participation required by this Court.[27]

In the electoral system upheld in *Chavis*, for example, blacks had ample reason to be discouraged at their prospects for political victory; and there is no reason to suppose that discouragement would have served in lieu of white control of the slating process as a factor supporting invalidation of the electoral scheme struck down in *Regester*. In their disregard of the

[26]"By acknowledging the right of *access*, however, the Court does not force the judiciary to influence the outcome of political elections. Rather, where a claim of dilution is made, the courts need only assess the ability of minority voters to participate on an equal basis with other citizens in the community's political processes." *Proportional Representation By Race, supra*, 80 Mich. L. Rev. at 827. (emphasis original).

[27]In this voting case, the Fifth Circuit accepted uncritically the absence of proof of a qualified applicant (candidate) pool in a way which it refused to do in *Robinson v. City of Dallas*, 514 F.2d 1271,

(continued)

undisputed evidence of effective black participation and political clout, and their eagerness to invoke a remedy to "provide blacks a realistic opportunity to elect blacks" (423 F. Supp. at 403; Juris. St. 42b), the Courts below have disestablished Mobile's existing form of government on a claim no more substantial than *Chavis'* "mere euphemism for defeat at the polls." 403 U.S. at 153.

While no interest group, racial or otherwise, is constitutionally entitled to proportional representation, *e.g., Beer v. United States, supra*, 425 U.S. at 136 n. 8, certainly any group which in fact achieves roughly proportional representation by "legislators of [its] choice" has not been denied access to the political process. *Chavis, supra*, 403 U.S. at 149. The contrary holdings below, therefore, have directly injected the concept of proportional representation by race into an electoral system heretofore racially neutral, and can be perceived only as a sanction for the view that no white official can adequately represent blacks, and *vice versa*. Only if this Court is now prepared to accept proportional representation by race as not only a desideratum but a constitutional requirement, can the holdings below be affirmed.

(footnote continued from preceding page)

1273-74 (5th Cir. 1975). Even more expansive statistical treatments require proof that the test would exclude applicants otherwise shown to be eligible. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n. 6. This Court in *Mayor v. Educational Equality League*, 415 U.S. 605, 620-21, distinguished the jury selection and other cases of starkly disparate impact "in which it can be asumed that all citizens are fungible," holding that in determining unlawful exclusion in municipal appointment, "the relevant universe for comparison purposes consists of the highest-ranking officers of the categories of organizations and institutions specified in the city charter, not the population at large."

II.

THE COURTS' DIVINATION OF RACIALLY DISCRIMINATORY INTENT FROM PASSIVE STATE LEGISLATIVE FAILURE TO CHANGE THE ELECTORAL SYSTEM TO GUARANTEE BLACK VICTORIES IS ERROR WHICH, IF UNCORRECTED, WILL INJECT THE FEDERAL COURTS INTO THE SUPERVISION OF EVERY FACET OF MUNICIPAL ADMINISTRATION

The Court of Appeals held, as the District Court had not, that proof of invidious racial purpose is here a necessary element under *Washington v. Davis, supra*, and subsequent cases of this Court following its principle.[28] Nonetheless, the Court held that the element of intent had been properly established.

The Court of Appeals held that the findings of the District Court "compel the inference that the [at-large

[28]The reasoning of the Court of Appeals is developed at length in the companion case of *Nevett v. Sides* (*Nevett II*), 571 F.2d 209, 217-221, and incorporated by reference in its *Mobile* decision. 571 F.2d at 241 (Juris. St. 2a).

The District Court had rendered its decision prior to such cases as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252; *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144; *Board of School Commissioners of Indianapolis v. Buckley*, 429 U.S. 1068; and *Austin Independent School District v. United States*, 429 U.S. 990.

commission] system has been *maintained* with the purpose of diluting the black vote. . . ." 571 F.2d at 245 (Juris. St. 12a) (emphasis added). The Court concluded that the finding that the Alabama Legislature had failed to change the City's at-large Commission Government, coupled with a general legislative awareness that districting has "racial consequences," constituted "direct evidence of the intent behind the maintenance of the at-large plan." 571 F.2d at 246 (Juris. St. 14a).[29]

The error in the Court of Appeals majority opinion's legal analysis is clearly expressed in the concurring opinion of Wisdom, J., in the companion case of *Nevett II, supra*, 571 F.2d at 232-233:

> "I agree that is is reasonable to argue, for example, that proof of the invidious effects of multi-member districts or at-large voting raises an inference, perhaps, in some cases, a strong presumption, of discriminatory purpose. That formulation is run-of-the-mine, acceptable, legal semantics—in some cases. It will not cover those cases in which the voting scheme was neutral when initiated or even benign but had unintended or inadequately considered invidious effects on the voting rights of minorities. In those cases, as the majority was driven to say, the discriminatory purpose is found in maintaining the voting plan,

[29]Finally, the Court relied upon the 1965 Act designating specific administrative functions, but not altering the at-large election of each Commissioner, as further probative of invidious "intent to maintain the plan. . . ." 571 F.2d at 246 (Juris. St. 14a).

> that is, taking no affirmative curative action. This view of inaction *is* inconsistent with *Washington v. Davis*." (emphasis original).

A. The Courts' "Tort" Standard Of Proof Would Invalidate Even The Continuation Of Facially Neutral Government Practices Supported By Entirely Legitimate and Racially Neutral Policies, Simply Because There Is General Awareness Of Racial Effect.

Both Courts below found that the City's existing form of government, together with its at-large electoral system necessarily attendant thereto, are facially neutral and were adopted for racially neutral, good-government purposes at a time when invidious racial motivations could have played no part (see *supra*, pp. 5-6). Yet the holding below deems the failure to alter Mobile's existing governmental structure (its "maintenance"), coupled with imputed legislative awareness that blacks might fare better politically under elections by single-member district, compelling proof of racial purpose.

This Court's recent decisions condemn this approach. For example, if awareness of racially disproportionate impact were equivalent to an invidious intent to accomplish such impact, the outcome of *Washington v. Davis*, where the police department continued to administer its employment test despite its awareness that a disproportionate number of black applicants failed, 426 U.S. at 252, would necessarily have been different. Similarly in *Village of Arlington Heights*, zoning officials were well aware that existing policies had the effect of maintaining the "nearly all

white" status of the village, and the Court of Appeals had held that they "could not simply ignore this problem," 429 U.S. at 260. Yet this Court upheld the maintenance of these policies for reasons racially neutral, despite their exclusionary effect.

The function of the purpose or intent requirement as applied in *Washington v. Davis* and *Village of Arlington Heights* is to assure that government actions which are designed to further valid objectives are accorded deference, and that those designed to further impermissible racial purposes are not. *Davis, supra*, 426 U.S. at 242-248; *Arlington Heights, supra*, 429 U.S. at 265-66.

The test of invidious intent applied below stands "deference" on its head. The City's long history of incorrupt Commission government and the uninterrupted maintenance of its integral at-large feature is anomalously used to rationalize the government's abolition. 571 F.2d at 244 (Juris. St. 10a).

Where the challenged action is indeed necessary to serve valid ends, *i.e.*, here to provide citywide perspective and responsibility for actions equally to each voter, it is insufficient to show that it has been "motivated in part by a racially discriminatory purpose." *Arlington Heights, supra*, 429 U.S. at 270 n. 21. Where such an action "would have resulted" even absent a racial purpose, it cannot be fairly attributed to racial motivations and "there would be no justification for judicial interference. . . ." *Id. See Davis, supra*, 426 U.S. at 253 (Stevens, J., concurring); *see also Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87.

B. The Courts' Tort Standard Therefore Imposes An Affirmative Duty Of Constant Racially-Conscious Electoral Restructuring Upon Legislatures.

The essence of the Court of Appeals' holding is that where application of its *Zimmer*[30] criteria indicates a current condition of polarized voting and black candidates' defeat, the maintenance of such a system without affirmative corrective action compels the inference of purposeful dilution. 571 F.2d at 245 (Juris. St. 12a).

The creation of such an "affirmative duty" might be compared to that imposed upon school boards following this Court's second decision in *Brown v. Board of Education*, 349 U.S. 294, 299 (*Brown II*). School boards which had operated State-compelled dual school systems were:

> "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38.

Yet such school systems had been adjudged unconstitutional *per se*. *Brown II, supra*, 349 U.S. at 298.

In contrast, at-large and multi-member electoral systems are clearly not unconstitutional *per se*. *Whitcomb v. Chavis, supra*, 403 U.S. at 159-60; *White v. Regester*, 412 U.S. at 765.

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[30]Both Courts below based their analysis upon the multifactor test presently controlling "dilution" cases such as this in the Fifth Circuit, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *affirmed sub. nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (but "without approval of the constitutional views" expressed in *Zimmer*, 424 U.S. at 638).

Even in the context of mandatory redistricting to conform to the one man-one vote principle, neither the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.*, nor the Constitution requires legislative elimination of at-large electoral components. *Beer v. United States*, 425 U.S. 130, 138-39, 142 n. 14.[31] And, by implication, this failure to eliminate at-large seats required no inference that the reapportionment was tainted with racial purpose. *Id.*

It is equally clear that even where minority voters are in fact substantially disadvantaged in their ability to elect minority candidates by an existing electoral plan in the presence of racially polarized voting, no *per se* constitutional violation exists and there arises no constitutional or statutory duty of "affirmative action" by the legislature to correct the situation. *United Jewish Organizations, supra*, 430 U.S. at 166-67. Yet the Courts' decision imposes just such a duty here.

Finally, the existence of racially polarized voting is turned on its head in the remedy. This unfortunate

[31]In *Beer*, this Court upheld New Orleans' redistricting plan which retained two at-large seats and which contained single-member districts drawn in a pattern which the Attorney General urged would slice up predominantly black districts and "almost inevitably" dilute the effectiveness of the black vote. 425 U.S. at 136. Although New Orleans' plan clearly afforded blacks less than maximum voting power, it passed the statutory standard of §5, 42 U.S.C. §1973c. 425 U.S. at 141. And it did not even "remotely approach a violation of the constitutional standards" set forth in *Regester*. *Id.* at 142 n. 14. While *Beer* demonstrates that legislative plans *need not* under the Constitution be so drawn as to assure proportional representation, 425 U.S. at 136 n. 8, *United Jewish Organizations* holds that a State legislature *may* constitutionally gerrymander along racial lines to assure proportional representation, at least in the course of redistricting subject to scrutiny under the Voting Rights Act. 430 U.S. at 162-65 (plurality opinion per White, J., joined by Stevens, Brennan, and Blackmun, J.J.).

feature of voter behavior is cited to declare at-large elections invalid. But without polarized voting (and residential housing segregation), a districting remedy would be a nugatory gain for blacks. The remedial Orders of the Courts must hope for, and indeed perpetuate, racially polarized voting and racially segregated residential housing for the future.

If either of two events occur, the Courts must then, under the rule of this case, redo their electoral handiwork. (1) If a decrease in residential segregation produces a black demographic shift (without a net change in the number of voters in a district), the District Court must redraw its district lines, even though this is not compelled by one-person-one-vote. At the other extreme, if blacks constitute over 50% of the voters,[32] then their benefit is maximized by a Court Order returning to elections at large. (2) Any other ethnic group, residentially segregated, can compete with blacks for the benefit of the Courts' electoral tinkering.[33]

[32]As they did in the companion case, *Nevett v. Sides*, 571 F.2d 209, 214 n. 6 (5th Cir. 1978).

[33]Fortuitously, in *Wise v. Lipscomb*, ____ U.S. ____, 98 S. Ct. 2493, it was the City and not the Court which struck a balance between the electoral desires of blacks and of Mexican-Americans.

III.

AFFIRMANCE HERE WILL AFFECT NOT ONLY MOBILE, BUT THE THOUSANDS OF LOCAL GOVERNMENTS NATIONWIDE THAT EMPLOY AT-LARGE ELECTIONS.

The Equal Protection Clause "was never intended to destroy the States' power to govern themselves" in this area. *Oregon v. Mitchell*, 400 U.S. 112, 126. Nor does it place State and local governments within a "uniform straitjacket" which precludes their choice of the form of government and electoral system thought to best suit local needs and preferences. *Avery v. Midland County*, 390 U.S. 474, 485. This Court has not held that local governments must district, but only that if they do, such districts must not contain "substantially unequal population." *Id.* at 485-86.

Such a course would be good constitutional jurisprudence even if the precise effects of form of government and electoral system upon "representation" were clear. But they are not. The question of how minorities are best assured of meaningful political participation is highly problematic. To guarantee election of blacks by creation of "safe" single-member districts is not necessarily to maximize black political effectiveness.[34] Jewell, *Local Systems of Representation: Political*

[34]Indeed opponents of at-large elections have suggested that elections by single-member geographical districts may not adequately guarantee minority representation. Note, *Ghetto Voting and At-Large Elections: A Subtle Infringement Upon Minority Rights*, 59 Geo. L. Rev. 989, 1009-11 (1970). Institutionalized systems of proportional representation of interest groups (such as those formerly used in New York City and Cincinnati, Ohio) and enlargement of city councils "to the size of state legislatures" have been proposed as the ultimate solution. *Id.*

Consequences and Judicial Choices, 36 Geo. Wash. L. Rev. 790, 803 (1968). A black minority may

> "have greater influence on a legislative delegation of a city council elected at-large than on one elected by districts. All the legislators or councilmen elected at-large would have Negro constituents; only a minority of those elected by districts would represent Negroes. Whether Negro voters could affect decisions more through greater influence on a few representatives or a smaller degree of influence on all representatives might be a difficult question for Negro leaders to answer. It would be an even more difficult decision for a court attempting to determine the constitutionality of at-large elections." *Id.*

Mobile does not assert that its Commission form of government and at-large electoral system are necessarily the "best" for all times and all communities. Mobile does assert that its system serves important policy considerations relating to a city-wide perspective in government, and that the City's electoral system in no way precludes full unfettered black participation in all phases of the political process.

Whitcomb v. Chavis, supra, 403 U.S. at 156-160, makes it quite clear that the Federal judiciary does not sit as a body of political scientists weighing the efficacy of varying theories of government or political representation. At the municipal level, "the question of districting has been at the heart of the controversies over the form of government to be adopted, and the advocates of at-large and single-member districting have articulated conflicting theories about the representative process." Jewell, *supra*, 36 Geo. Wash. L. Rev. at 804. In their earnest desire to assure black Mobilians "a reasonable opportunity to elect blacks"

(423 F. Supp. at 403; Juris. St. 42b), the Courts below have fallen into a trap of choosing "among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate form of government. . ." *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

This was the inevitable result of the focus of the Courts below on what they concluded black political participation *cannot* presently accomplish (*i.e.*, electing a black Commissioner), to the exclusion of what it *has* accomplished (*i.e.*, substantially influencing or even "swinging" election outcomes, making black electoral clout a force to be reckoned with). The patent error of this approach is to transmute the constitutional right of equal access and participation into one of guaranteed "representation" by officials of one's race. And the patent danger is that few existing forms of local government assure such a result. *Cf. Chavis, supra,* 403 U.S. at 156-57.[35]

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[35]As in *Chavis, supra*, 403 U.S. at 157:

> "At the very least, affirmance [here] would spawn endless litigation concerning the [at-large electoral] systems now widely employed in this country."

Over 67% of this Nation's 18,500 municipal governments employ at-large elections. (Derived from Table 3/15, *The Municipal Year Book*, International City Management Association (1972)). Some 41% of this Country's over 3,000 counties also elect officials at-large. (Derived from Table 2, *Governing Boards of County Governments: 1973*, U.S. Bureau of the Census 1974)).

CONCLUSION

Since 67% of cities have at-large elections, it is important to put into perspective the impact of the rule of this case unless reversed. The rule is that an at-large jurisdiction with residential segregation and ethnically polarized voting must be districted to guarantee proportional representation to each minority group.

This rule is as applicable to Poles, Jews and all other ethnic groups as to blacks. This rule ironically places a political premium on maintaining the residential segregation which gives electoral efficacy to a districting remedy. And, the "passive maintenance" rule of intent puts municipal officials under a constant duty to evaluate—not only as to voting but in any area where a Fourteenth Amendment challenge might lie—whether *inaction* has an ethnically disparate effect.

Moreover, the remedy under such a rule is to order ethnically proportional government *action*. And this remedial standard would be applicable as broadly as the Fourteenth Amendment: it would impel Federal Courts to order ethnically proportional streetlights, jobs (*cf., Washington v. Davis*), rezonings (*cf., Village of Arlington Heights v. Metropolitan Housing Development Corp.*) and all other municipal services. This rule forces the Federal Courts to intrude into the daily actions and inactions of each municipality to a degree neither warranted by the Constitution nor within the technical competence of said Federal Courts.

Respectfully submitted,

C.B. Arendall, Jr.
William C. Tidwell, III
Travis M. Bedsole, Jr.
Post Office Box 123
Mobile, Alabama 36601

Fred G. Collins
City Attorney
City Hall
Mobile, Alabama 36602

Charles S. Rhyne
William S. Rhyne
Donald A. Carr
Martin W. Matzen
1000 Connecticut
Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for Appellants

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No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,
Appellants,

v.

WILEY L. BOLDEN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEES

J. U. BLACKSHER
LARRY MENEFEE
1407 Davis Avenue
Mobile, Alabama 36603

EDWARD STILL
Suite 400
Commerce Center
2027 First Avenue North
Birmingham, Alabama 35203

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Appellees

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 77-1844

CITY OF MOBILE, ALABAMA, et al.,

Appellants,

v.

WILEY L. BOLDEN, et al.,

Appellees.

On Appeal From The United States Court Of Appeals
For the Fifth Circuit

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Should this Court overturn the concurrent findings of fact of the two courts below that Mobile's at-large election system is maintained and operated for the purpose of discriminating against black voters?

2. Did the district court clearly err in finding that the Mobile's at-large elections "operate to minimize or cancel out the voting strength" of blacks in violation of White v.

Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971)?

3. Does Mobile's at-large election system violate the Fifteenth Amendment or section 2 of the 1965 Voting Rights Act?

4. Did the district court err in fashioning a remedy for the proven violation?

STATEMENT OF THE CASE

Black citizens brought this class action to challenge the at-large system for electing Mobile's city commission. The complaint alleged that the overall electoral structure was maintained to discriminate against blacks and that it permitted a hostile white majority to bar blacks from effective participation in the political process. The district judge heard 37 witnesses during a six day trial, received over 150 documentary exhibits (including computer analyses of election returns), and personally toured the city accompanied by the lawyers for all parties. In October, 1976, he issued extensive findings of fact and concluded that the at-large election of Mobile's city commissioners unconstitutionally diluted black voting strength, and was invidiously discriminatory in purpose. J.S. 40b-42b.

Following the failure of a bill to reapportion Mobile in the 1976 state legislature, and in light of the imminence of city elections in August 1977, the district court asked the parties to propose remedial plans. The city defendants opposed the election of a commission from single-member districts, and expressed a preference for a mayor-council form of government if single-member districts were to be used. The defendants, however, refused to propose any plan that did not fully preserve at-large elections, although agreeing to nominate two persons whom the court appointed to a three-man advisory committee. The advisory committee proposed a mayor-council plan based largely on the mayor-council plan in operation in Montgomery, an Alabama city of comparable size. After soliciting further comments from all parties and from various other Mobile elected officials, and after making certain modifications, the district court adopted the committee's single-member district plan and ordered that it be used in the 1977 elections. At the same time, the court offered to dissolve its injunction should the

legislature enact its own constitutional plan, and it stayed the remedial elections pending appeal. J.S. 3d; A. 8.

The court of appeals affirmed the district court's judgment and findings of fact. It rejected the city's contention that an election system may be maintained for a discriminatory purpose so long as it was originally created for a racially neutral reason. J.S. 13a-17a.

SUMMARY OF ARGUMENT

I. Section 2 of the 1965 Voting Rights Act prohibits the use of election practices which "deny or abridge the right . . . to vote on account of race or color." This should be construed in pari materia with section 5 of that Act which forbids certain jurisdictions to use new election practices which will have the "purpose . . . or . . . effect" of so denying or abridging the right to vote. Both sections are concerned with the same type of denial or abridgement; section 5 merely establishes special procedures for new practices in particular states and subdivisions.

The meaning of the Act as applied to districting plans is well established. Blacks cannot be subjected to a districting system which would "nullify their ability to elect the candidate of their choice." Allen v. Board of Elections, 393 U.S. 544, 569 (1969). The courts below correctly found that Mobile's at-large election system operated in just that manner.

II. The courts below found that Alabama had rejected the use of single-member city council districts in Mobile in order to prevent the election of black city officials. The evidence before those courts included uncontradicted testimony by members of the state legislature that this was the reason for maintaining at-large elections, as well as a long history of intentional discrimination by Alabama officials against black voters. At-large plans adopted by the legislature for electing the state House and officials of other cities have been invalidated by other court decisions as racially motivated. This Court should not disturb the concurrent findings of fact of the two courts below that the legislature was also acting from racial motives in rejecting plans to permit Mobile to use single-member districts.

The courts below correctly held that a racially motivated decision to maintain a practice or procedure violates the Fourteenth Amendment even if the practice or procedure was originally created for a racially neutral purpose. In Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 268 (1977), which establishes the method of proving racial motivation, the decision at issue was a refusal to alter a preexisting zoning classification.

III A. Reynolds v. Sims, 377 U.S. 533 (1964), prohibits the use of election systems which systematically overweight the votes of one group while underweighting the votes of another. In Reynolds that unequal weighting was achieved by placing voters in districts of unequal population. Fortson v. Dorsey, 379 U.S 433 (1965), recognized that such unequal weighting could come about in other ways including, under certain circumstances, through the operation of an at-large election system.

White v. Regester, 412 U.S. 755 (1973), presented such circumstances. In that case whites by voting as a bloc selected and controlled

all the legislators elected at-large from Dallas and Bexar counties in Texas. The votes of blacks and Mexican-Americans were thus systematically nullified. The system was the functional equivalent of one in which all whites lived in a district with an excess number of legislators, while blacks and Mexican-Americans lived in a district with no representatives at all. As a result of this system virtually no blacks or Mexican-Americans were elected to the legislature, and the white legislators were unresponsive if not hostile to the interests of minority voters. White was not based on the existence of racially exclusive slating practices; there was no slating in Bexar county, and the slating in Dallas county was merely symptomatic of the underlying racial and political realities.

B. White does not require a showing of racial motivation in the creation or maintenance of the at-large system. Fortson and its progeny repeatedly stated that they applied to at-large election systems which "designedly or otherwise" minimize the voting strength of a disfavored

group. 379 U.S at 433. White itself contained no discussion of the purposes behind the Dallas and Bexar county plans. White, as Reynolds v. Sims, derives from that branch of Equal Protection law which prohibits interference with or impairment of the franchise because it is "a fundamental right." Washington v. Davis, 426 U.S 229 (1976), on the other hand, applies to the Equal Protection prohibition against "racial classifications", and only as to that aspect of the Fourteenth Amendment is proof of racial intent necessary.

This Court has subsequent to Washington v. Davis repeatedly referred with approval to the dilution rule of White. Connor v. Finch, 431 U.S. 407, 422 (1977); United Jewish Organizations v. Carey, 430 U.S 144, 165, 170, 179 (1977).

C. The appellants never urged in the lower courts that White was inapplicable to city elections, and have thus abandoned the issue. White should be applied to the election of local government officials. Reynolds v. Sims, from which White stems, applies to such local elections.

Avery v. Midland County, 390 U.S 474 (1968). Elections of local officials frequently have a far greater impact on voters than the selection of state legislators. This Court applied the White standards to the election of city officials in Beer v. United States, 425 U.S. 130, 142 n.14 (1976).

D. The courts below correctly found that Mobile's at-large election system operates to effectively disenfrauchise black voters. The evidence showed, and the district court found, that whites vote as a bloc against black candidates or white candidates who are supported by black voters, that no black has ever won an at-large election in Mobile, that no black candidate could do so under the present system, and that under the all-white city commission Mobile had engaged in a wide variety of practices discriminating against its black residents. The record in this case contains the same evidence deemed sufficient to establish a constitutional violation in White. The district court's finding of such a violation, resting on "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multi-member

district in the light of past and present reality, political and otherwise," should be upheld. White v. Regester, 412 U.S at 769.

IV. The Fifteenth Amendment prohibits the use of election systems "which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." Lane v. Wilson, 307 U.S. 268, 275 (1939). Lane does not require any showing that such barriers were racially motivated. In view of the fact that the Fifteenth Amendment singles out the franchise for special protection, a broader standard is appropriate for election laws burdening blacks than under the general prohibition against racial classifications contained in the Fourteenth Amendment. See Washington v. Davis, supra.

V. The district court did not err in formulating the remedy in this case. Despite the finding of a violation the defendants refused to propose or enact a remedy. The defendants did indicate, however, that if at-large elections were

to be abolished, they opposed continuation of the commission form of government and preferred a mayor-council plan. The district judge therefore ordered into effect a mayor-council plan based largely on the mayor-council plan in operation in Montgomery, Alabama. The court further provided that its plan could at any time be superseded by any other constitutional plan authorized by the legislature. Thus Alabama is free to use a commission form of government with commissioners elected from single-member districts, a system actually utilized in several other states.

ARGUMENT

I. MOBILE'S AT-LARGE SYSTEM OF ELECTION VIOLATES SECTION 2 OF THE 1965 VOTING RIGHTS ACT

The complaint in this action alleges that Mobile's at-large election system violates section 2 of the 1965 Voting Rights Act. A. 18. That provision, codified in 42 U.S.C. §1973, provides:

> No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Both courts below noted the existence of this statutory claim, but neither decided it. J.S. 4a-5a n.3; A. 27. The practice of this Court, however, is to avoid the decision of constitutional issues if it is possible to resolve a case on non-constitutional grounds. Wood v. Strickland, 420 U.S. 308, 314 (1975); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944).

Section 2 does not on its face require that a forbidden practice involve a purpose of denying or abridging the right to vote. The phrase "on account of" appears to contemplate some causal relation between abridgement and the race of the victim, but does not suggest that that connection must be a motive to discriminate in the mind of a legislator. The legislative history of section 2 throws no direct light on the meaning of that provision.

Elsewhere in the Voting Rights Act, however, Congress provided a more complete definition of the types of election practices it sought to prohibit. Section 5 of the Act, 42 U.S.C. §1973c, establishes special procedures for reviewing new election laws and procedures in certain

jurisdictions, providing that such a law and procedure may not be enforced unless the jurisdiction involved can establish that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." As used in section 5 the phrase "on account of" cannot refer to legislative motivation, or section 5 would turn on the presence of a "purpose or effect of purposefully denying or abridging the right to vote."

It is unlikely that Congress used the words "on account of" in section 2 in a different sense than they were used in section 5. On the contrary, section 2 should be construed in pari materia with section 5. See Erlenbaugh v. United States, 409 U.S 239, 243-44 (1973). This Court has consistently taken account of a later statute "when asked to extend the reach of [an] earlier Act's vague language to the limits which, read literally, the words might permit." N.L.R.B. v. Drivers Local Union, 362 U.S. 279, 291-92 (1960). "[I]f it can be gathered from a subsequent statute in pari materia what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of

its meaning. . . ." United States v. Freeman, 3 How. (44 U.S.) 556, 564-65 (1845). These considerations apply with particular force when construing related portions of a single statute. In this case section 5 of the Voting Rights Act should be regarded as identifying with greater specificity the types of prohibited practices alluded to more vaguely in section 2.

This construction serves to give to the Voting Rights Act "the most harmonious, comprehensive meaning possible." Clark v. Uebersee Finanz-Korp, 332 U.S. 480, 488 (1947). Section 5 is "an unusual, and in some respects a severe, procedure for insuring that states would not discriminate on the basis of race in the enforcement of their voting laws." Allen v. Board of Elections, 393 U.S. 544, 558 (1969) (emphasis added). With regard to new election practices in covered jurisdictions, section 5 requires approval prior to implementation, limits approval proceedings to submissions to the Attorney General or an action before a three-judge federal court in the District of Columbia, and places the burden of proof as to factual issues on the proponents of the proposed practice. These procedures were fashioned to

shift the advantages of time and inertia from the perpetrators of the evil to its victims." United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148, 160 (1978). There is, however, no reason to believe that Congress also intended to set a different substantive standard under section 5 than the standard established by section 2 for old laws in the covered jurisdictions and for new and old laws in the rest of the country.

If sections 2 and 5 contained different substantive standards a number of anomalies would result. Within a state covered by section 5 a single election law could be valid in one city and invalid in another based solely on the date on which each city put the law into operation. See Perkins v. Matthews, 400 U.S. 379, 394-95 (1971). Practices forbidden in section 5 jurisdictions would be permissible in the other states, even though the practices had the same purpose and effect in both instances. Section 4 of the Voting Rights Act did establish temporarily a narrowly focused different substantive standard for covered jurisdictions, prohibiting there the use of certain specified "tests or devices"; but Congress in that instance was well aware it was establish-

ing different election rules than existed outside the South, and it acted to abolish that distinction five years later by making that ban nationwide. Oregon v. Mitchell, 400 U.S 112, 133-34 (1970). This Court should not in the absence of clear congressional intent read back into the Act different substantive standards falling along regional lines.

Once it is recognized that the standard for judging election practices is the same under section 2 as under section 5, the application of section 2 to this case is not difficult. Jurisdiction over section 2 actions is conferred on the federal courts by 28 U.S.C. §1343(4). Allen v. Board of Elections, 393 U.S. 544, 554-57 (1969), holds that section 5 can be enforced by private actions; the reasoning of Allen applies a fortiori to section 2, since the Attorney General is not expressly authorized to enforce that section, and absent private enforcement the guarantees of section 2 might well "prove an empty promise." 393 U.S. at 557.

That the use of at-large elections may have the effect of denying or abridging the right to vote under section 5 has been repeatedly recog-

nized by this Court. City of Richmond v. United States, 422 U.S. 358, 371 (1975); Georgia v. United States, 411 U.S. 526, 532-35 (1973); Perkins v. Matthews, 400 U.S 379, 388-91 (1971). City of Richmond noted that such at-large elections may do so by "creat[ing] or enchanc[ing] the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council." 422 U.S. at 371. The record and findings in this case, which we set out in detail infra at pp. 67-82, demonstrate that Mobile's at-large election system had just such an impact. That system placed 67,000 blacks in a district with 122,000 whites, enabling the whites by bloc voting to consistently exclude from the city commission not only blacks but even whites who had revealed an interest in serving the needs of the black community. The system predictably resulted in a city government which discriminated in virtually every phase of its activities against black residents of the city. This evidence was sufficient to meet plaintiffs' burden of establishing a violation of section 2 of the Voting Rights Act.

II. MOBILE'S AT-LARGE SYSTEM OF ELECTION IS MAINTAINED AND OPERATED FOR THE PURPOSE OF DISCRIMINATING ON THE BASIS OF RACE

Although the Questions Presented described in the Jurisdictional Statement and Brief for Appellants deal primarily with the application of the dilution rule of White v. Regester, 412 U.S. 755 (1973), the decisions below invalidated Mobile's at-large method of election based on a finding of discriminatory intent. J.S. 12a-15a, 30b. The constitutional prohibition against such racially motivated election schemes is well established. Gomillion v. Lightfoot, 364 U.S. 339 (1960). Accordingly the first constitutional issue presented by this appeal is the correctness of the factual findings of discriminatory intent made by the lower courts. This Court does not ordinarily "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Appellees maintain that no such unusual circumstances are present here.

An assessment of the factual findings of the courts below must begin with an understanding of the history and details of Alabama statutes regarding the structure of municipal government. City and town governments fall into three categories. First, the structure that prevailed throughout the nineteenth century, and which continues today, is a mayor-alderman government; under this plan the method of electing aldermen depends on the size of the city and number of wards within it.[1/] A city the size of Mobile would ordinarily elect most if not all of its aldermen from single-member districts.[2/] Second, since 1911 Alabama municipalities have also been authorized to use the commission form of government, under which three commissioners are elected at large and perform both legislative and ad-

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1/ Ala. Code §11-43-40 (1975).

2/ Mobile presently has 31 wards. If it adopted the mayor-alderman system Mobile would be required by section 11-43-40 to reduce the number of wards to no more than 20; the city council would consist of one member from each of these districts plus a council president elected at-large.

ministrative functions.[3] Alabama general law permits cities to adopt either the mayor-alderman or commission form of government by referendum. Of 420 Alabama cities only 14 presently use the commission system.[4] In recent years, however, the mayor-alderman plan has proved unsatisfactory, particularly for the larger cities, because the mayor's powers are too weak.[5] Accordingly, authorization has been sought from the legislature for a third form of government, a mayor-council plan with a strong mayor. Instead of adopting general legislation permitting all municipalities to choose this plan, however, the legislature has authorized it only on a case-by-case basis for particular cities. A mayor-council plan was

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3/ Ala. Code §11-44-1, et seq. (1975).

4/ The Alabama cities governed by commissions are Arab, Bessemer, Brundidge, Cherokee, Florence, Gadsden, Jasper, Madison, Mobile, Muscle Shoals, Opelika, Troy, Tuscaloosa and Tuscumbia.

The use of the commission form of government nationally is similarly uncommon. As of 1978 only 114 of 2477 cities over 10,000 used such commissions, less than 5%. Municipal Yearbook: 1978, Table 3.

5/ The most serious problem is that the council of aldermen can interfere with routine executive functions. Tr. 349, 1152.

authorized for Birmingham in 1953[6] and for Montgomery in 1973;[7] in both cases the city voters chose in a subsequent referendum to adopt such a plan in place of the commission form of government.

The actions with which the courts below were primarily concerned were refusals by the legislature in 1965 and 1976 to permit the people of Mobile to adopt a mayor-council plan under which the city council could be elected from single-member districts. In 1965 the legislature authorized Mobile to adopt a mayor-council plan, but expressly considered and refused to allow Mobilians to opt for single-member districts.[8] In 1976 the legislature considered and rejected a proposal, known as the "Roberts Bill",[9] to authorize Mobile to choose a mayor-council plan with seven single-member districts and two at-

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6/ Ala. Code App. §1603 et seq. (1966 Supp.).

7/ Ala. Code App. §1247 (216a) et seq. (1974 Supp.).

8/ Ala. Acts. Reg. Sess. 1965, No. 823; see also P. Ex. 98, pp. 40-41.

9/ A. 249, 250, 256.

large council members. In each case, we maintain, and the courts below found, that the refusal to allow Mobile to adopt single-member districts was caused by fear that such districts would permit the election of black candidates.

In Alabama proposals affecting only one city are not as a practical matter considered by the whole legislature. The actual functioning of the legislature was described in detail by the district court:

> The state legislature observes a courtesy rule, that is, if the county delegation unanimously endorses local legislation the legislature perfunctorily approves all local county legislation. The Mobile County Senate delegation of three members operates under a courtesy rule that any one member can veto any local legislation. If the Senate delegation unanimously approves the legislation, it will be perfunctorily passed in the State Senate. The county House delegation does not operate on a unanimous rule as in the Senate, but on a majority vote principle, that is, if the majority of the House delegation favors local legislation, it will be placed on the House calendar but will be subject to debate. However, the proposed county legislation will be perfunctorily approved if the Mobile County House delegation unanimously approves it. J.S. 29b-30b.

Thus the decisions to forbid Mobile voters to choose a plan with city councilmen elected from single-member districts were made by the Mobile legislative delegation.

The evidence before the district court included direct testimony by members of the Mobile legislative delegation who were in office when single-member council districts were rejected in 1965 and 1976. Robert S. Edington, who served in the Alabama legislature from 1962 to 1974, testified candidly about the reason for rejecting such districts in 1965:

> Q. Why was the opposition to single member districts so strong?
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> A. At that time, the reason argued in the legislative delegation, very simply was this, that if you do that, then the public is going to come out and say that the Mobile legislative delegation has just passed a bill that would put blacks in city office. Which it would have done had the city voters adopted the Mayor Council form of government. P. Ex. 98, p. 43.

Senator Roberts testified that in 1976, even though the Mobile delegation was well aware that blacks could not be elected or "be able to elect candidates of their choice" if only multi-member

districts were used, a white State Senator from Mobile had vetoed the Roberts proposal to create some single-member districts. A. 255-58. Representative Gary Cooper was "relatively certain" the Roberts Bill had been opposed in the legislature because "it would allow the possibility for blacks to hold public office in the City government". P. Ex. 99, p. 20. Representative Cain J. Kennedy explained that the prospect of blacks winning public office was the primary area of legislative concern regarding 1975 proposals for single-member district elections for the school board and county commission. P. Ex. 100, pp. 29-30. Such direct testimony about the statements and motives of the legislators who made the actual decisions in 1965 and 1976 was "highly relevant." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

The direct evidence was supported by the evidence and the district court's conclusions that the impact of the decision to reject single-member districts bore "more heavily on one race than another." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266. No

black has ever been elected to the at-large commission, and no black has ever won any at-large election in Mobile City or County. Numerous witnesses familiar with the local political and racial situation in Mobile testified that no black could win such an at-large election.[10/] The district court concluded:

> Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a city-wide election because of race polarization. J.S. 10b.

Thus the effect of barring the adoption of single-member council seats, an effect of which the legislators were well aware, was to prohibit the election of blacks to city office in Mobile.

That that prohibition was the purpose, and not merely the effect, of the legislative decisions of 1965 and 1976 is also confirmed by the long and deplorable history of discrimination in voting by Alabama officials. The Alabama Con-

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10/ See n. 41, infra.

stitutional Convention of 1901 enacted a number of measures intended to disenfranchise blacks, including a poll tax, a literacy test, and education, employment and property qualifications. Those requirements were so effective that by the end of World War II only 275 blacks were registered in Mobile County, compared to 19,000 whites.[11] United States v. State of Alabama, 252 F.Supp. 95 (M.D. Ala. 1966), held that the purpose of these measures was to subvert the Fourteenth and Fifteenth Amendments, and declared the poll tax invalid because of the discriminatory intent behind it.[12] In 1903 the legislature authorized

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11/ P. Ex. 2, McLaurin, "Mobile Blacks and World War II: The Development of a Political Consciousness," 4 Proceedings of the Gulf Coast History and Humanities Conf. 47, 50 (1973).

12/ One convention delegate explained:

"* * * We want the white man who once voted in the state and controlled it to vote again. We want to see that old condition restored. Upon that theory we took the stump in Alabama having pledged ourselves to the white people upon the platform that we would not disfranchise a single white man if you trust us to frame an organic law for Alabama, but it is our purpose, it is our intention, and here is our registered vow to disfranchise every Negro in the state and not a single white man." 252 F.Supp. at 98.

political parties to exclude voters from primary elections on the basis of race;[13] the state Democratic Party adopted an all-white primary which remained in effect until well after Smith v. Allwright, 321 U.S. 649 (1944). In 1946 the state adopted a measure requiring voters to interpret any provision of the Constitution; three years later it too was struck down as an unconstitutionally motivated "contrivance by the State to thwart equality in the enjoyment of the right to vote by citizens of the United States on account of race or color". Davis v. Schnell, 81 F.Supp. 872, 879 (S.D. Ala. 1949), aff'd 336 U.S. 933 (1949). Discriminatory application of registration requirements continued as a brutally effective method of excluding blacks until adop-

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13/ Ala. Acts, 1903 Reg. Sess., No. 47, § 10.

tion of the Voting Rights Act of 1965.[14/] When increased black registration appeared inevitable, Alabama officials resorted to more sophisticated measures to effectively disenfranschise blacks. In 1957 the legislature gerrymandered virtually all blacks out of the city of Tuskegee; this Court held that such a clear "impairment of voting rights" could not be accomplished by cloaking it "in the garb of the realignment of political subdivisions." Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960).

Mobile itself was the subject of special legislative attention. By 1956, despite the variety of discriminatory measures then in force,

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14/ See, e.g., United States Commission on Civil Rights, With Liberty and Justice for All, pp. 59-75 (1959); United States Commission on Civil Rights, Voting, pp. 23-28 (1961). A list of injunctions in force against Alabama officials is set out in Sims v. Baggett, 247 F.Supp. 96, 108, n.24 (M.D. Ala. 1965). See also State of Alabama v. United States, '192 F.Supp. 677 (M.D. Ala. 1961), aff'd 304 F.2d 583 (5th Cir.), aff'd 371 U.S. 37 (1962).

14% of Mobile's voting age black population was registered. A. 574. With fear of desegregation a burning political issue in the wake of Brown v. Board of Education, 347 U.S 483 (1954), and with the Eisenhower Administration pressing for enactment of what was to become the Civil Rights Act of 1957, special sessions of the Alabama legislature sought to preserve the state's segregationist policies. The legislature enacted proposed constitutional amendments to authorize legislation establishing private, racially segregated schools[15/] and transferring public recreational facilities to private control[16/] Resolutions were adopted denouncing Brown itself and proclaiming Alabama's "deep determination" to preserve its long established discriminatory policies.[17/] Along with

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15/ Ala. Acts. 1956 1st Extra. Sess., No. 82.

16/ Ala. Acts. 1956 2d Extra. Sess., No. 67.

17/ Ala. Acts. 1956 2d Extra. Sess., No. 58.

this avowedly racist program, the legislature adopted a statute annexing to Mobile several substantial white suburbs, thus tripling its total area, but carefully excluding two nearby black neighborhoods.[18] But for this annexation the 1970 population of Mobile would have been 54% black, compared to the 35% minority within the present enlarged boundaries.[19] Cf. City of Richmond v. United States, 422 U.S. 358 (1975).

In 1965 the legislature adopted a local law[20] mandating the allocation of specific executive functions to each of the Mobile commissioners; the Attorney General, acting under section 5 of the 1965 Voting Rights Act, interposed an objection to this statute on the ground

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18/ Ala. Acts, 1956 2d Extra. Sess., No. 18. These neighborhoods had originally been included in the bill when, as required by state law, its contents were advertised in the local papers. Mobile Register, March 2, 1956, p. 1A.

19/ The annexed area is the southwest section of the city boardered by Interstate 10 on the north and Interstate 65 on the east. The 26 census tracts in this area have a population of 70,689, of whom 67,414 are white. The total population of the city is 189,986, of whom 122,100 are white. United States Census, City County Data Book, p. 630 (1972).

20/ Ala. Acts, 1965 Reg. Sess., No. 823.

that it would as a practical matter preclude the election of commissioners from single-member districts. J.S. 3a, n.2

In recent years the principal device used to disenfranchise Alabama blacks has been the creation or maintenance of multi-member districts which submerge large concentrations of black voters.[21] Perkins v. Matthews, 400 U.S. 379, 389 (1971). In 1965 the legislature created a number of multi-county multi-member districts for electing the state House; they were struck down as racially motivated in Sims v. Baggett, 247 F.Supp. 96 (M.D. Ala. 1965). Hendrix v. McKinney, ____

21/ The shift to at-large election schemes as a fallback against the growing numbers of newly enfranchised blacks is characteristic of other Southern states as well. See Zimmer v. McKeithen 485 F.2d 1297, 1304 (5th Cir. 1973)(en banc), aff'd sub nom., East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Jenkins v. City of Pensacola, ____ F.Supp. ____ (N.D. Fla., Aug. 11, 1978); Paige v. Gray, 437 F.Supp. 151 (M.D. Ga. 1977); Stewart v. Waller, 404 F.Supp. 206 (N.D. Miss. 1975); Derfner, "Racial Discrimination and the Right to Vote," 26 Vand. L. Rev. 523, 552-55 (1973); Parker , "County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," 44 Miss. L. J. 391 (1973).

F.Supp. ____ (M.D. Ala. 1978), held that the at-large plan for electing the Montgomery County Commission was adopted by the legislature in 1957 "to dilute black voting strength". ___ F.Supp. at ____. Proposals to elect Democratic party officials at-large were found to have a discriminatory purpose in United States v. Democratic Executive Committee, 288 F.Supp. 943 (M.D. Ala. 1968), and Smith v. Paris, 257 F.Supp. 901 (M.D. Ala. 1966), aff'd, 386 F.2d 979 (5th Cir. 1967). Acting under section 5 of the Voting Rights Act, the Department of Justice has disapproved a series of Alabama statutes to create new at-large districts on the ground that they had the purpose or would have the effect of discriminating on the basis of race.[22/]

The historical background of the 1965 and 1976 decisions thus reveals "a series of official actions taken for invidious purposes". Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S at 267. Indeed, that history includes one of the same official actions which

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22/ Hearing Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., p. 598 (1975); see also United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148 (1978).

Arlington Heights cited as an example of such a history of discrimination, 429 U.S. at 267, citing Davis v. Schnell, and involves the same discriminatory device at issue in this case.

In light of this evidence the courts below properly concluded that the decisions of 1965 and 1976 were racially motivated. The district court held:

> The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to black voters passing until the State was redistricted by a federal court order. J.S. 30b.

The Fifth Circuit noted the existence of "direct evidence of the intent behind the maintenance of the at-large plan". J.S. 14a. It concluded that "the district court's findings are not clearly erroneous", J.S. 12a, and that they support its conclusion that "invidious discriminatory purpose was a motivating factor" in the maintenance of

Mobile's at-large election scheme. J.S. 15a.[23/]

The court of appeals properly held that a law which is maintained for a discriminatory purpose is unconstitutional regardless of the motive which led to its original enactment. J.S. 13a-14a. Arlington Heights itself recognized that a racially motivated decision to maintain the zoning classification of a particular lot would violate the Fourteenth Amendment regardless of the origin of that classification. 429 U.S. at 257-58, 268-71 n.17. In this case we have, not unexplained and perhaps unconsidered legislative

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23/ In a companion case, Nevett v. Sides, the court of appeals noted that much of the evidence which would support a finding of dilution under White v. Regester, 412 U.S. 755 (1973), would also be evidence of a discriminatory purpose in establishing or maintaining the at-large system. 571 F.2d 209, 222-25 (5th Cir. 1978). Nevett suggested that "under proper circumstances" evidence sufficient to establish dilution might also be sufficient to establish a prima facie case of intentional discrimination. 571 F.2d at 223. What those circumstances might be was not decided by the court of appeals. Neither is that issue presented by the instant case, since, as the Fifth Circuit noted, J.S. 14a, the record in this case contains an array of other types of evidence, both direct and circumstantial, of discriminatory intent.

inaction, but two affirmative and express legislative decisions. The first is the adoption of a statute in 1965 from which the possibility of single-member districts was intentionally excluded. The second is the de facto veto by a single state senator of a single-member council plan. So long as the motivation involved is impermissible, no ground exists for distinguishing these legislative actions from others to which the Fourteenth and Fifteenth Amendments apply.

This case well illustrates the widsom of the two court rule. The evidence in the record would be sufficient to require a finding of discriminatory motive even if this Court undertook to reconsider that issue de novo. But the decisions of the courts below, especially that of the district court, involve more than the review of a cold record. In conducting the "sensitive inquiry" contemplated by Arlington Heights, the district judge was able to bring to bear an understanding of local political, legislative and racial realities born of years of legal, judicial and practical experience in the state. He was able to assess the demeanor of the witnesses who testified with direct personal knowledge of the

motives of the legislature. Both courts below were able to weigh the evidence with a sensitivity to the continuing problems in states with long histories of de jure segregation. No judge lightly undertakes to enter a finding of intentional discrimination; the decision in a case such as this is invariably tempered by a desire not to impugn the motives of local public officials. When a district judge is compelled to conclude that those officials have acted from racial malice, and does so on a record as substantial as that in the instant case, that conclusion is entitled to the "great weight . . . accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances." Mayor v. Educational Equality League, 415 U.S. 605, 621 n.20 (1974).

II. THE DISTRICT COURT CORRECTLY APPLIED THE PRINCIPLES OF WHITE v. REGESTER AND WHITCOMB v. CHAVIS

In affirming the district court finding of unconstitutionality the court of appeals relied on the district court finding of purposeful discrimi-

nation. J.S. 12a-15a. The district court had also found that Mobile's at-large plan impermissibly diluted the votes of black residents in violation of White v. Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971). J.S. 22b, 33b-34b. The court of appeals upheld those findings of fact as well, agreeing that they "amply support the inference that Mobile's at-large system unconstitutionally depreciates the value of the black vote." J.S. 12a. The court of appeals, however, thought that a violation of White required a finding of discriminatory purpose. J.S. 2a. Appellees maintain that White prohibits at-large plans that have such effects regardless of the motivation behind them; accordingly we urge that these findings afford an alternative ground for affirmance.

A. The Legal Standard Established By White and Whitcomb

The dilution standard applied in White and Whitcomb derives from the one-person, one-vote rule of Reynolds v. Sims, 377 U.S. 533 (1964). Reynolds proceeded from the principle that "any alleged infringement of the right of citizens to

vote must be carefully and meticulously scrutinized" because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." 377 U.S. at 561. In Reynolds, also an Alabama case, there were no formal or party barriers to voting. But this Court held:

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.... It also includes the right to have the vote counted at full value without dilution or discount.... That federally protected right suffers substantial dilution ... [where a] favored group [h]as full voting strength ... [and] the groups not in favor have their votes discounted. 377 U.S. at 555 n.19.

Nothing on the face of the districting plan in Reynolds demonstrated such unequal weighting of votes, but evidence regarding the population of the state senate districts proved that such inequalities existed. 377 U.S. at 568-570.

Only six months after Reynolds this Court recognized that population differences were not the only way in which a facially neutral district-

ing plan might undervalue the votes of some and overvalue the votes of others. Fortson v. Dorsey, 379 U.S. 433 (1965), held that the use of multi-member districts was not unconstitutional per se merely because at-large voting "could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters" of an area large enough to constitute a single-member district. 379 U.S. at 438. But, Fortson warned:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. 379 U.S. at 439.

In such a case a 60% majority, if it voted as a bloc, could control the selection of 100% of the at-large officials; the votes of the majority would carry full weight, while the votes of the minority would have no value whatever. It would be the functional equivalent of a scheme in which the 60% majority resides in a district with more representatives than were warranted by the

population of the district, while the 40% minority lived in a district with no representatives at all.

The next year Burns v. Richardson, 384 U.S. 73 (1966), held that a scheme which in fact "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population" would "constitute an invidious discrimination," 384 U.S. at 88, but concluded that the multi-member plan in that particular case had not been shown to have such an "invidious result." 384 U.S. at 88-89. Burns noted that there was no evidence in the record in that case that the disputed plan, under the local conditions there involved, would "by encouraging bloc voting ... diminish the opportunity of a minority ... to win seats." 384 U.S. at 88 n.14.

The first detailed consideration of the dilution standard came in Whitcomb v. Chavis, 403 U.S. 124 (1971), where the Court rejected a claim that a multi-member plan for electing state legislators in Marion County, Indiana, would operate to minimize the voting strength of black voters. The Court held that the requisite minimizing effect had not been proven. Whitcomb

emphasized that, as in Burns, black candidates had not lost because of bloc voting against blacks, but because of ordinary partisan voting. 403 U.S. at 134 n.11. Blacks had been regularly nominated by both the Democratic and tje Republican parties, and had lost, when they did, only when their entire party slate went down to defeat. 403 U.S. at 150 n.30, 152-53.[24/] Thus direct evidence demonstrated that minority voters had not been disenfranchised by majority bloc voting against minority candidates.

Whitcomb noted that this direct evidence was confirmed by other evidence regarding the politi-

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24/ It appeared that in 99% of all elections since 1920 no candidate had lost when the rest of his or her party's slate prevailed. Chavis v. Whitcomb, 305 F.Supp. 1364, 1385 (S.D. Ind. 1969). The importance of partisan rather than racial considerations is underlined not only by the fact that blacks often won in the majority-white multi-member districts, but also by the fact that black voters voted against even black Republican candidates. Graves v. Barnes, 343 F.Supp. 704, 727 n.18 (W.D. Tex. 1970).

cal and racial realities in Marion county. First, minority candidates were not totally excluded from the legislature or kept at nominal levels; on the contrary, nine blacks had in fact been elected to the legislature from the at-large district between 1960 and 1968. They had won on their own strength, not as tokens appointed and controlled by white officials. 403 U.S. at 150 n.29. These electoral victories were inconsistent with the hypothesis that the whit majority was regularly electing slates composed solely of white legislators catering only to white concerns. Second, there was no evidence or finding that the white legislators were unresponsive to the needs and interests of their black constituents. 403 U.S. at 152, 153-4, 155 n.32. Such responsiveness might have been expected if the political and racial realities had resulted in an undervaluation of black votes. Third, there was no evidence of a history of official discrimination likely to generate or reinforce the sort of racial attitudes that would result in bloc voting against candidates from, or supported by, the black community. The record revealed no incidents of public or private discrimination for several decades prior

to the disputed elections, and the state had had a civil rights law since 1885. Graves v. Barnes, 343 F.Supp. 704, 727 n.18 (W.D. Tex. 1972).

White v. Regester, 412 U.S. 755 (1973), presented the kind of evidence found absent in Burns and Whitcomb. White held that the use of multi-member districts had operated to "cancel out or minimize the voting strength of racial groups" in Bexar and Dallas counties in Texas. There was direct evidence of bloc voting by whites in Bexar County;[25/] in Dallas the existence of bloc voting was indicated by the successful use of "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." White v. Regester, 412 U.S. at 767.

This direct evidence of the differing value of black and white votes was confirmed by other evidence. The multi-member system resulted in near total exclusion of minority legislators.

25/ "The record shows that the Anglo-Americans tend to vote overwhelmingly against Mexican-American candidates . . . . ." Graves v. Barnes, 343 F.Supp. at 704.

During the previous century only two blacks had ever been elected from Dallas and only five Mexican-Americans from Bexar county. Graves v. Barnes, 343 F.Supp. at 726 n.17, 732. This pattern could not be explained as a result of partisan voting; in both counties winning the Democratic nomination usually guaranteed election to the legislature, and the exclusion of minority candidates had occurred in the Democratic primary.[26/] The district court found that the white legislators were comparatively unresponsive to the needs of minority residents of their districts, White v. Regester, 412 U.S at 767, 769; it noted, for example, that "[s]tate legislators from Dallas County, elected county-wide, led the fight for segregation legislation during the decade of the 1950's." Graves v. Barnes, 343 F.Supp. at 726. All this occurred in a state with a long history of official discrimination against blacks and Mexican-Americans, a policy well calculated to produce the racial bloc voting by whites of which the plaintiffs complained. White v. Regester,

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26/ No Republican had been elected to the House from Bexar county since 1880. Graves v. Barnes, 343 F.Supp. at 731.

412 U.S. at 767-68; Graves v. Barnes, 343 S.Supp. at 725, 726, 727-731.

Appellants urge that White holds only that multi-member districts are unconstitutional when there is an organized slating process which is controlled by whites, which virtually never slates black candidates or candidates favored by the black community, and which effectively determines the outcome of the elections. Brief for Appellants, pp. 8, 22, 23. But White struck down multi-member districts in Bexar County where there was no slating process whatever. Graves v. Barnes, 343 F.Supp. at 731.[27/] The slating practices that existed in Dallas were merely symptoma-

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27/ Appellants suggest that the decision regarding Bexar County stemmed from the fact that there were unconstitutional restrictions on registration and voting by minority voters. Brief for Appellants, p. 22 n.25. But those practices had ended a year before the district court decision and two years before the decision of this Court. Breare v. Smith, 321 F.Supp. 1110 (S.D. Tex. 1971); Garza v. Smith, 320 F.Supp. 131 (W.D. Tex. 1971). No decision of this Court suggests that multi-member districts should be struck down wherever there is a recent history of discrimination in voting; such a rule would preclude the use of such schemes in most of the South. Had that been the rule contemplated by Fortson, that decision, arising in Georgia in 1964, would have struck down multi-

tic of the underlying racial situation, a formalization of the process ordinarily achieved by white bloc voting alone. In the absence of white bloc voting, no slating process which systematically excluded both minority candidates and white candidates sympathetic to the needs of the minority community could long have survived in a county that is 25% non-white. If White had turned on the exclusion of blacks from the slating process -- there equivalent to election -- it would have relied, not on Fortson, Burns and Whitcomb, but on the prohibition against racially closed nominating processes announced in Terry v. Adams, 345 U.S. 461 (1953).

White also recognized that the factual questions presented in such a case require "an intensely local appraisal" of the evidence by the district judge, who inevitably brings to the case a personal familiarity with local history and "past and present reality, political and other-

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27/ Cont'd

member districts throughout the state, since discrimination against black voters was far more virulent and open there and then than the practices that continued in Texas in 1970.

wise." 412 U.S. at 768-770. The district court must assess the existence and impact of white bloc voting, and weigh the significance of other less direct evidence of dilution. White perceived that these are issues often difficult to resolve on a cold record.

The concept of dilution applied in White and Whitcomb is neither amorphous nor unfamiliar to this Court. The same concept has been repeatedly utilized by this Court in assessing redistricting plans subject to section 5 of the Voting Rights Act. Allen v. Board of Elections, 393 U.S. 544, 569 (1969); Perkins v. Matthews, 400 U.S. 379, 388-391 (1971); Georgia v. United States, 411 U.S. 526, 532-35 (1973); City of Richmond v. United States, 422 U.S. 358 (1975); Beer v. United States, 425 U.S. 130 (1976); cf. United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 149, 161 (1978). Georgia v. United States relied on Whitcomb as demonstrating that multi-member districts have "the potential for diluting the value of the Negro vote". 411 U.S. at 535. It relied as well on Reynolds v. Sims, 411 U.S. at 532, as did Perkins, 400 U.S.

at 390. Allen, also relying on Reynolds, noted that placing black voters in a majority white at-large district, could "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." 393 U.S. at 569. Such a system of electing a city government, City of Richmond noted, "created or enhanced the power of the white majority to exclude Negroes totally from participating in the governing of the city through membership on the city council." 422 U.S. at 371.

The uses of the dilution standard under White and section 5, however, differ in two ways. First, section 5 applies only to new redistricting plans which increase the degree of dilution, Beer v. United States, 523 U.S. at 139-142, while White prohibits the use of even old districting plans so long as the degree of dilution is sufficient to substantially undervalue black votes. Second, in a section 5 proceeding the burden of establishing the absence of increased dilution is on the city or state seeking to enforce a new plan, whereas under White the opponent of multi-member districting bears the burden of proof.

Appellants apparently regard racially polarized voting by white residents of Mobile, a practice at times actively encouraged by white officials,[28] as a normal part of the political process indistinguishable from voting on party lines. Brief for Appellants, p. 31. Both the Constitution and the decisions of this Court properly treat that distinction as of paramount importance. The franchise is a valuable right because it can be exercised to decide "issue-oriented elections." Whitcomb v. Chavis, 403 U.S. at 159. But that right is rendered nugatory if candidates are regularly defeated, not because of their ideas or ideology, but because of the color of their skin or of that of their supporters. In this case the record shows that the overwhelming majority of white voters in Mobile consistently vote against any black candidate regardless of his or her policies or merits.[29] That is a burden which is not now, and historically rarely has

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28/ See p. 79, infra.

29/ See pp. 69-71, infra.

been, inflicted on any other ethnic, religious, or national group other than blacks and Mexican-Americans.[30] White voters are entitled to cast their ballots on any basis they may please, including that of race. But they are not entitled to have the state maximize the impact of racially based votes by means of at-large elections.

The rule of White and Whitcomb, though originating in Reynolds v. Sims, has several alternative foundations. Anderson v. Martin, 375 U.S. 399 (1964), held that a state could not "encourage its citizens to vote for a candidate solely on account of race" by placing on its

30/ In 1960, for example, despite the immense publicity and concern about President Kennedy's religion, he received about 40% of the Protestant vote. More than 1 out of 2 votes for President Kennedy was cast by a Protestant voter. T.H. White, The Making of the President 1960, p. 400 (1961).

ballots the race of each candidate. 375 U.S. at 404. Neither can a state enforce an election scheme which operates to maximize the impact of racial voting by whites. Where, as here, racial voting has its roots in a century of officially practiced and advocated discrimination, such a scheme perpetuates the effect of that past discrimination.[31] Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 28 (1971). An election system which "places special burdens on a racial minority within the governmental process . . . is no more permissible than denying them the vote." Hunter v. Erickson, 393 U.S. 385, 391 (1969). Here, as in Hunter, "although the law on its face treats Negro and white . . . in an identical manner, the reality is that the law's impact falls on the minority." 393 U.S. at 391.

Reynolds and its progeny prohibit a state from maintaining an election system which values the votes of one group of voters higher than that of another group, and recognize that this for-

31/ See, Shofner, "Custom, Law, and History: The Enduring Influence of Florida's Black Code," The Florida Historical Quarterly 277 (Jan. 1977).

bidden result may occur in a variety of ways.[32/] White and Whitcomb hold that a plaintiff may establish the existence of this proscribed unequal valuation by proving that the overall structure of a multi-member district system operates to so maximize the weight of a bloc voting white majority that the votes and electoral preferences of the non-white minority are consistently nullified. Such a system is the functional equivalent of one in which whites reside in a district which has an excess number of elected representatives while blacks are relegated to a district which has no representatives at all.

Reynolds does not require that a group be totally disenfranchised, but only that its votes are not given equal weight. In a malapportionment case it is possible to assess with some precision the weight given to each ballot. This precision of calculation is not feasible in a dilution

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32/ This case presents no issue regarding when such a forbidden result would be caused by a mixed system of single-member and at-large districts or by an array of single-member districts which systematically divided a substantial non-white community among a number of majority white districts. See Beer v. United States, 425 U.S. 130, 142 n.14 (1976).

case under White and Whitcomb; thus a showing of a fairly gross disparity in the weight attached by the election system to the votes of white and black voters will ordinarily be necessary to meet the plaintiff's burden of proof. White and Whitcomb do not guarantee proportional representation for blacks or any other group. If black candidates or white candidates supported by black voters are defeated by ordinary partisan considerations and voting, Whitcomb holds that no unconstitutional dilution of black votes is shown. Where whites do not usually vote as a bloc, an isolated incident in which a black or a black-supported candidate is defeated by white bloc voting would not be sufficient to prove dilution under White.

B. The Irrelevance of Intent Under White and Whitcomb

In a companion case below the court of appeals considered whether a showing of discriminatory motivation was required under Whitcomb and

White. Nevett v. Sides, 571 F.2d 209, 217-225 (5th Cir. 1978). This aspect of Nevett was expressly incorporated into the decision in the instant case. J.S. 2a. A majority of the court of appeals in Nevett held that such intent was necessary in light of Washington v. Davis, 426 U.S. 229 (1976); Judge Wisdom disagreed, concluding instead that proof of intent was not required under White and Whitcomb, 571 F.2d. at 231-38, as had an earlier en banc Fifth Circuit decision. Kirksey v. Board of Supervisors, 554 F.2d 139, 148 (5th Cir. 1977), cert. den. 434 U.S. 968 (1977). Appellees maintain that this aspect of the Fifth Circuit's majority opinion was erroneous. We brief this issue since it bears on whether Whitcomb and White provide an alternative ground for affirmance.

Insofar as appellants or the court below suggest that White and Whitcomb required proof of discriminatory intent prior to Washington v. Davis, the opinions of this Court clearly demonstrate the contrary. The dilution rule was first

suggested by Fortson v. Dorsey, 379 U.S. 433 (1965), which indicated this Court would invalidate a plan if

> designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. 379 U.S. at 433 (emphasis added).

Burns v. Richardson, 384 U.S. 73, 88 (1966), quoted this passage, and then in its own language emphasized that either discriminatory intent or dilution was sufficient to invalidate a multimember district plan, although neither had been proved on the record in that case.

> [T]he demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more apropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting. 384 U.S. at 88-89 (emphasis added).

A legislature's proposed remedy, Burns added, could only be rejected if it "was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 384 U.S. at 89 (emphasis added).

Whitcomb v. Chavis noted at the outset that there was no suggestion that the multi-member districts in that case "were conceived or operated as purposeful devices to further racial or economic discrimination. As plaintiffs concede, 'there was no basis for asserting that the legislative districts in Indiana were designed to dilute the vote of minorities.'" 403 U.S. at 149. With the intent issue thus disposed of, the Court turned to an exhaustive discussion of whether the evidence established unconstitutional dilution under Fortson, 403 U.S. at 149-160, and the balance of the opinion is concerned solely with the impact of the Marion County multi-member district. This part of the opinion would have been irrelevant, if not unintelligible, if the Court had thought that the absence of discriminatory intent was dispositive of the case. Abate v. Mundt, 405 U.S. 182, 185 n.2 (1971), decided the

same day as Whitcomb, held that multi-member plans would be struck down if they "operate to impair the voting strength of particular racial or political elements...." (Emphasis added).

White v. Regester invalidated under the dilution rule the multi-member districting plans for Dallas and Bexar counties. 412 U.S. at 765-770. White contains not a word regarding the motives of the State Legislative Redistricting Board which had adopted those plans. Rather, it upheld a district court decision which invalidated those plans because they "operated to dilute the voting strength of racial and ethnic minorities," 412 U.S. at 759 (emphasis added), and which held that "the impact of the multi-member district on [Mexican-Americans] constituted invidious discrimination." 412 U.S. at 767 (emphasis added). Two years after White this Court reiterated that the Constitution forbids plans which "designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Chapman v. Meier, 421 U.S. 1, 17 (1975) (emphasis added).

Nothing in Washington v. Davis indicates any intent to overrule this aspect of Fortson, Burns,

Whitcomb, White or Chapman. On the contrary, those five cases and Washington v. Davis deal with two distinct and independent aspects of the Equal Protection Clause. Burns and its progeny, like Reynolds v. Sims, derive from the Clause's guarantee that the votes of citizens will not be weighted differently for any reason. Thus Reynolds does not rest on any malicious intent to disenfranchise urban or suburban voters; it recognized that the differences in the size of districts often derived from good faith concerns, but held that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population based representation." 377 U.S. at 580; see also Lucas v. Colorado General Assembly, 377 U.S. 713, 736-37 (1964). It held that statutes which operate to abridge or deny the franchise must be subjected to strict constitutional scrutiny because the right to vote is "a fundamental right, . . . preservative of all others." 377 U.S. at 562.

Washington v. Davis, on the other hand, considered what types of laws constitute "racial classifications" which trigger the strict scrutiny test. 426 U.S. at 242; see McLaughlin v. Florida, 379 U.S. 184, 191-2 (1969). The prohibition against racial classifications is concerned with "the prevention of official conduct discriminating on the basis of race," Washington v. Davis, 426 U.S. at 238, not the "idea that every voter is equal to every other voter ...." Reynolds v. Sims, 377 U.S at 588. Thus in discussing past cases bearing on the racial classification aspect of the Equal Protection Clause, none of the opinions in Washington v. Davis had occasion to mention the dilution cases. The majority recited a number of lower court opinions using the disapproved effect standard, 426 U.S. at 244 n.12; although the Court was well aware of the application of the dilution test by the lower courts, see East Carroll Parish School Board v. Marshall, 424 U.S. 636, 638 (1976), none of those opinions was cited. The White v. Regester effect rule was referred to with apparent approval in two decisions handed down during the same Term as Washington v. Davis, a step that would have been unlikely had the

Court had any reservations about that rule. East Carroll Parish School Board v. Marshall, supra; Beer v. United States, 425 U.S. 130, 142 n.14 (1976).[33/] Even more significantly, White and the other dilution cases were relied on by this Court after Washington v. Davis in Connor v. Finch, 431 U.S. 407, 422 (1977) ("impermissible racial dilution"), United Jewish Organizations v. Carey, 430 U.S 144 (1977),[34/] and Wise v. Lipscomb, 57 L.Ed.2d 411, 418 n.5 (1978).

Appellants do not suggest that Washington v. Davis has overruled Reynolds v. Sims, or that a state could after Washington retain districts of unequal population or restore the county unit system invalidated by Gray v. Sanders, 377 U.S. 533 (1963), so long as the state did have a discriminatory motive. Yet such schemes often

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33/ Similarly Keyes v. School District No. 1, 413 U.S. 189, 205, heavily relied on by Washington as establishing a requirement of "purpose or intent to segregate," 426 U.S. at 240, was decided three days after White.

34/ Id. at 165 (plan did not "minimize or unfairly cancel out white voting strength) (White, J.), 170 (plan had not "effectively downgraded minority participation in the franchise") (Brennan, J.), 179 (plan did not "minimize or cancel out the voting strength of a minority class or interest") (Stewart, J.).

underweight the votes of disfavored voters by just 10% or 20%, giving that group only a fractionally smaller portion of the representation to which their numbers entitle them. By contrast at-large systems like those in White underweight the votes of blacks by 100%, and frequently afford them no representation at all. Surely this more drastic form of disenfranchisement remains as subject to attack as the milder forms of geographic malapportionment also forbidden by Reynolds.

Washington v. Davis and this Court have thus recognized that the prohibition against racial classifications and the protection of equal suffrage are two distinct branches of Equal Protection, and that White and Whitcomb are part of the latter branch. Thus the dilution cases, which prior to Washington v. Davis did not require a showing of racial motivation, remain good law.[35/]

C. The Applicability of White and Whitcomb to Municipal Elections

Appellants in their Opposition to Motion to Affirm urged that the rule of White and Whitcomb should not be applied to municipal

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35/ See L. Tribe, American Constitutional Law, 754 (1978).

elections. This issue was not raised by their Jurisdictional Statement, is not discussed in the Brief for Appellants, and is not encompassed within the Questions Presented described in either. Most significantly, this issue was never raised by appellants in the courts below, and consequently none of the opinions below considered it. See Brief for Appellants, p. 12. Under these circumstances appellants failed to preserve the issue.

Even were the question properly before this Court, there can be little doubt that White and Whitcomb apply to city elections. At least since Yick Wo v. Hopkins, 118 U.S. 356 (1898), the constitutional commands addressed to the states have been applied to municipalities and other arms of a state. "Political subdivisions of States -- counties, cities, or whatever -- have been traditionally regarded as subordinate government instrumentalities created by the State to assist in the carrying out of State governmental functions." Reynolds v. Sims, 377 U.S. 353 (1964). To establish lower constitutional requirements

for such subdivisions would be to invite the states to evade their constitutional responsibilities by the simple expedient of transferring the affected functions to local governments. See United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148, 162 (majority opinion), 171-72 (Powell, J. concurring) (1978). An attempt to avoid by such distinctions the commands of Brown v. Board of Education, 347 U.S. 483 (1954), was expressly rejected in Cooper v. Aaron, 358 U.S. 1, 15-16 (1958).

The one-person, one-vote requirement of Reynolds, from which White and Whitcomb derive, was applied to local government units in Avery v. Midland County, 390 U.S. 474 (1968). This Court noted:

> While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. . . .In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of

> the application of the Equal Protection Clause of the principles of Reynolds v. Sims, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties. 390 U.S. at 481.

Local governments spend almost twice as much money and have almost three times as many employees as state governments.[36/] With respect to school board elections, this Court reasoned:

> It might be suggested that equal apportionment is required only in "important" elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think the decision of the State to select that official by popular vote is a strong enough indication that the choice is an important one.

Hadley v. Junior College District, 397 U.S. 50, 55 (1970). Although the dissenting opinions in Hadley questioned the extension of Reynolds to

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36/ Statistical Abstract, 1972, pp. 410, 433.

certain special purpose entities, they acknowledged that "local units having general governmental powers are to be considered ... like state legislatures." 397 U.S at 61 (Harlan, J., dissenting). Salyer Land Co. v. Tulare Water District, 409 U.S. 719, 727-29 (1973), reaffirmed the application of Reynolds to a "local government exercising general governmental power" or providing "general public services such as schools, housing, transportation, utilities, roads. . . . a fire department [or] police. . . . "

To protect city residents from undervaluation of their votes based on geography, but deny them protection from undervaluation based on race, would be to stand on its head the purpose of the Fourteenth Amendment. Slaughter House Cases, 16 Wall. 36, 71-72 (1873). Of the six decisions of this Court reaffirming the dilution rule first announced in Fortson, none prior to a concurring opinion in Wise v. Lipscomb, 57 L.Ed.2d 411, 423 (1978), intimated that the applicability of that rule was any less broad than the general requirement of Reynolds. On the contrary, Beer v. United States, 425 U.S 130, 142 n.14 (1976), expressly measured a city council districting plan by the

standards of White and Whitcomb. See also United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148, 162 (1978). Indeed, the reach of White and Whitcomb seems greater than Reynolds itself, for while it might be permissible in the case of a specialized water district for the legislature to make a reasoned decision to deny the vote to some residents because they were not property owners, it would not be proper to enforce an election system which enabled bloc voting whites to effectively disenfranchise some property owners because they are black. See Salyer Land Co. v. Tulare Water District, supra.

Black voters must have an effective voice in the conduct of local government if they are to achieve the equality of treatment and freedom from discrimination to which we are committed by history and the Constitution. A majority of blacks in the United States live in cities of over 25,000.[37/] For them, as for the black residents

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37/ See 1970 Census, Characteristics of Population, v.1, Tables 48, 67.

of Mobile, how those programs and laws are administered is vital to their safety, health, and very lives. Mobile's city government is responsible for police and fire protection, sewers, roads, drainage, zoning, libraries, job training, public housing, industrial development, and parks and recreational programs, and operates its own court system. If local government, like the states, is an ongoing experiment in the development and delivery of essential public services, Holt Civic Club v. City of Tuscaloosa, 47 U.S.L.W. 4008, 4011-12 (1978), it too is an experiment in which blacks are entitled to participate on the same basis as whites.

D. The Application of White and Whitcomb to The Facts of This Case

The doctrine of White and Whitcomb is both well established and well founded. Whether the district court correctly found the constitutionally forbidden dilution on the record in this case is a distinct issue, but an issue of relatively narrow import. Appellees did not challenge the validity of all at-large elections or of

all at-large elections under the commission form of government, nor could we have done so. The courts below did not hold that at-large elections or the commission sytem were unconstitutional throughout the country or throughout Alabama, but dealt solely with the facts in this record regarding Mobile. In three companion cases below the Fifth Circuit declined to strike down at-large plans,[38] as it had previously refused to do in a substantial number of earlier cases.[39]

The impact of such election schemes varies widely with local circumstances; although multi-member districts had the prohibited consequences in Dallas and Bexar counties, that did not mean they necessarily had such an effect elsewhere in Texas or in the South. As appellants correctly note, blacks are able to win elections in some

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38/ Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. pending, No. 78-492; Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978).

39/ E.g., Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977); David v. Garrison, 553 F.2d 923 (5th Cir. 1977); Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975).

cities despite the use of multi-member districts, Brief for Appellants, pp. 11, 18, presumably because related election laws, local political and/or racial realities were different than in Dallas. The issue here is whether the evidence and district court findings support the court's conclusion that the use of at-large elections in Mobile operated "to minimize or cancel out the voting strength" of the black population. This factual finding was concurred in by the court of appeals, and should be upheld in this Court.

The district court's ultimate finding of dilution was grounded on a number of subsidiary findings, none of which is seriously disputed by appellants.

First, the district court found there was racially polarized bloc voting by white voters in Mobile. "The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs." Appellants concede that this white bloc

against black candidates and interests is an "unfortunate feature of voter behavior." Brief for Appellants, pp. 30-31.[40/]

Second, the district court noted that no black had ever won any at-large election to any public office in Mobile, including elections to the city commission, the school board, or the state legislature. J.S. p. 7b, 8b, 35b. It also concluded that in Mobile there is "no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization," J.S. 10b, noting that "[p]ractically all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected

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40/ Exhaustive analyses of election returns were prepared by experts for the defendants, A. 581-90, and for the plaintiffs. A-56-66, 591-92; P. Ex. 10-52. Both concluded that whites voted as a bloc against blacks and black-supported candidates. The trial judge noted that the existence of such racial bloc voting in Mobile was "common knowledge." A. 65.

against a white." J.S. 7b-8b.[41/] Appellants do not directly dispute this finding, but urge that able black candidates can carry "a City," citing as examples Detroit, Newark and Los Angeles. Brief for Appellants, p. 11, n.14. But the constitutionality of at-large elections in Mobile depends on the political and racial realities of Mobile, not of Detroit or Dallas.

Third, the district court concluded that "the city-wide elected municipal form of government as practiced in the City of Mobile has not [been] and is not responsive to blacks on an equal basis with whites. . . . Past administrations not only acquiesced to segregated folkways, but actively enforced it by the passage of numerous city ordinances." J.S. p. 35b-36b. The court found that under the all-white commission the city had since 1960 maintained segregated airport,[42/]

41/ This finding is fully supported by the record. A. 79-50, 96, 119, 128, 129, 138, 147, 198-99, 207-208, 305, 518; P. Ex. 98, pp. 37-38; P. Ex. 99, pp. 20-22, 26, P. Ex. 100, pp. 23-25, 33.

42/ J.S. 126.

bus,[43] and recreation facilities,[44] discriminated against black neighborhoods in providing for drainage,[45] road repairs,[46] sidewalks,[47] and parks,[48] and discriminated against blacks in the hiring and assignment of city employees,[49] particularly police officers.[50] Although blacks constitute 35% of the Mobile population, the evidence showed that less than 7% of some 800 people recently appointed by the white commissioners to local government boards and committees were black,[51] and that 29 of the active boards and

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43/ J.S. 12b.

44/ J.S. 12b.

45/ J.S. 15; A. 524-25, 531-33.

46/ J.S. 16; A. 614, 619.

47/ J.S. 16; P. Ex. 75.

48/ J.S. 17.

49/ J.S. 11b-14b; P. Ex. 73.

50/ J.S. 11b; see n. 52, infra.

51/ J.S. 12b-14b; A. 601-604; P. Ex. 64.

committees had no black members at all. A. 601-604. Of the 290 city employees paid over $10,000 a year, only 3 were black. A. 917. The court emphasized that federal courts had repeatedly been required to enjoin discrimination by Mobile.[52] The district judge noted that as recently as 1976 white police officers in Mobile had conducted a mock lynching of a black suspect,[53] and that the white city officials had

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52/ J.S. pp. 12b, 36b; Allen v. City of Mobile, 18 F.E.P. Cases, 217 (S.D. Ala. 1978); Allen v. City of Mobile, 331 F.Supp. 1134 (S.D. Ala. 1971), aff'd 466 F.2d 122 (5th Cir. 1972), cert. den. 412 U.S. 909 (1973); Anderson v. Mobile City Commission, Civil Action No. 7388-72-H (S.D. Ala. 1973); Sawyer v. City of Mobile, 208 F.Supp. 548 (S.D. Ala. 1963); Evans v. Mobile City Lines, Civil Action No. 2193-63 (S.D. Ala. 1963); Cooke v. City of Mobile, Civil Action No. 2634-63 (S.D. Ala. 1963).

53/ P. Ex. 65; A. 605-610. Eight white officers placed a noose around the neck of the suspect, strung it over a tree, and pulled the man to his tiptoes. Defendant Doyle, a white city commissioner, objected to use of the term "lynch" because the victim had not died. A. 266. Charges against the black suspect who was the victim of this outrage were later dropped. See also Pl. Ex. 65.

investigated the incident with notable reluctance. The court concluded that that "sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the political fear of the white backlash vote when black citizens' needs are at stake." J.S. 19b.[54/]

Fourth, the district court noted that Alabama had a long history of officially practiced and advocated racial discrimination against potential black voters, a history in which white officials from Mobile had played a leading role.[55/] Not until the Voting Rights Act of 1965 were blacks able to register in substantial numbers.[56/] The court concluded that in Mobile "[t]he pervasive effects of past discrimination still substantially affect black political participation." J.S. 7b.

54/ All three of the present white commissioners stated that they would not support local ordinances prohibiting racial discrimination in housing or employment. A. 301-02, 480, 497-99.

55/ J. S. 19b; P. Ex. 2, pp. 50-51, 53-54.

56/ Prior to that Act the black registration rate in Mobile was lower than even other urban areas in the South. S. Lawson, Black Ballots: Voting Rights in the South, 1944-1969, p. 9 (1976).

Finally the court noted the existence of several election rules not essential to at-large elections that aggravated the dilutive effect of Mobile's at-large system. The system, like that in White v. Regester, includes a majority run-off and numbered place requirement, which "enhanced the opportunity for racial discrimination." White v. Regester, 412 U.S. at 766; J.S. 21b, 39b, 40b. Also, as in White, there was no residence requirement, so that "all candidates may be selected from outside the Negro residential area." White v. Regester, 412 U.S. at 766 n.10; J.S. 21b, 40b.

Appellants do not directly question these findings, but offer several contentions by way of defense.

Appellants contend that no black has ever been elected to the city commission because in their view the black candidates who have run were not "able" or "serious" candidates. Brief for Appellants, p. 11. The district court, however, found, and virtually all the city politicians who testified agreed, that a black would not win such a city-wide race, and that the certainty of electoral defeat had deterred black politicians

in Mobile from running for the commission. J.S. 11b, 35b.[57] The evidence showed that a serious campaign for the city commission cost $50,000,[58] a very substantial sum in a city were the average black family earns only $4,617.[59] It is hardly surprising that few black leaders had volunteered to undergo the pointless exercise of spending such sums and a commensurate amount of time and effort on a race that was certain to be lost because of white bloc voting. There was, moreover, ample evidence as to the bloc voting by white Mobile city residents against black candidates of undisputed experience and qualification who ran for the school board and county commission.[60]

57/ That finding is amply supported by the record. A. 79-80, 96, 129, 147, 198-99; P. Ex. 99, pp. 20-22; P. Ex. 100, p. 23-25.

58/ A. 482-83; P. Ex. 100, p. 23.

59/ Census of Population, County and City Data Book, 1972, p. 633.

60/ J.S. 8b-10b; A. 592; see also the district court's opinion in the Mobile school board case, Williams v. Brown, No. 78-357, J.S. 6b-7b. Two-thirds of the county population lives in the city of Mobile. The appellants' own experts relied on data from such county races in drawing conclusions regarding Mobile city voters. P. Ex. 9; A. 575-90.

Appellants point to the election of white Commissioner Joseph Langan as evidence of black political influence. Brief for Appellants, pp. 8-9. We agree that what happened to Commissioner Langan is important, but contend that it substantiates the district court findings of dilution. Langan was elected to the commission in 1953, when black registration was so low that blacks were not "a significant factor" in Mobile elections. A. 115. Although Langan initially had the support of a majority of white voters, he courageously established a moderate record of disapproval of discrimination. The record indicates, however, that racial polarization increased in Mobile as a federally imposed end to segregation finally became a reality in the late 1960's.[61] It was not until Langan's last race in 1969 that the 1965 Voting Rights Act had removed the massive discrimination against blacks seeking to register and

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61/ This was the view of the defendants' own expert. See A. 582-85.

vote. In that race he received the overwhelming majority of the substantial black vote. But Langan was defeated despite that black support, "because of the fact of the backlash from the black support and his identification with attempting to meet the particularized needs of the black people of the city." J.S. 9b.

The defendants' own expert concluded that "[i]dentification with the black wards is the kiss of death for an office-seeker in Mobile. The black voters constitute such a visible and emotional issue that any identification with blacks in Mobile will produce a reaction by white voters and defeat the black supported candidate." A. 585[62/] The record reveals that Langan's 1969 oppponent circulated advertisements attacking him for having received the support of black voters,[63/] and pointedly displaying

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62/ Black and white politicians agreed with this conclusion. A. 95, 119, 136-37; P. Ex. 98, p. 10; P. Ex. 99, p. 9; P. Ex. 100, p. 10.

63/ Court of Appeals Appendix, v. II, p. 711.

photographs of a black whom Langan had appointed to a city board.[64/] Other political literature in recent Mobile elections also attacked white candidates for receiving black votes, juxtaposed photographs of such candidates with black leaders, and even villified one white female candidate for having "been seen and photographed in the company of black males."[65/]

Finally, appellants argue that, even if it is impossible to elect a black in Mobile, black voters participated effectively in the political process because they are permitted to vote on which white candidate would be elected to the city commission. They note that in 1973 white candidates sought the endorsement of the black Non-Partisan Voters League, Brief for Appellants, p. 9, and suggest that blacks provided the margin of victory for Commissioner Greenough in 1973 and perhaps in other races. Id. pp. 8-10 and n. 7.

64/ Id. p. 712.

65/ Id. pp. 704-714; P. Ex. 61, 97; A. 593-99.

The record reveals a very different story. Although several white candidates sought and received the endorsement of the Non-Partisan Voters League in 1973, that was not indicative of black support; a substantial majority of the black voters voted against the endorsed candidates.[66/] The defendants own expert concluded that since 1960, with the exception of Langan, "no candidate who has won a majority in the black wards has also carried the entire city." A. 582. The record reveals that Commissioner Greenough lost the black vote by a margin of about 60% to 40%, Tr. 1133-35, and won the 1973 election only because he had the support of approximately 60% of the white voters.

It was doubtless the case in Dallas and Bexar counties in White v. Regester that the votes of blacks and Mexican-Americans might at times influence the outcome of a race between white candidates, but that was also true of the under-

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66/ D. Ex. 28, 29.

valued votes cast in large counties in the county-unit system condemned by Gray v. Sanders, 372 U.S 368 (1963). White forbids the use of an at-large system which affords to blacks "less opportunity than . . . other residents in the district to participate in the political process and to elect [officials] of their choice." 412 U.S. at 766. A system which, as here, operates to preclude blacks from electing any candidate of their own race or choice while permitting white voters to elect a candidate of theirs does not provide that equality of opportunity.

The record in this case thus reveals the type of evidence found missing in Whitcomb and deemed sufficient to establish a constitutional violation in White: racial bloc voting by whites that consistently defeats black candidates, unresponsiveness and racial discrimination by white officials elected at-large, a long history of

official discrimination, and the existence of laws which aggravate the racial effect of the at-large system. The district court's analysis of that evidence is far more exhaustive than that of the district court in White. Representing as it does "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multi-member district in the light of past and present reality, political and otherwise," 412 U.S. at 769-70, the district court's finding of dilution should be upheld.

IV. MOBILE'S AT-LARGE ELECTION SYSTEM VIOLATES THE FIFTEENTH AMENDMENT

The complaint in this action alleged that Mobile's at-large election system violated the Fifteenth Amendment as well as the Fourteenth. A. 18. Although both courts below noted the existence of this claim, J.S. 4a, 1b, neither discussed it. Appellees maintain that the Fifteenth Amendment provides an alternative ground for affirmance.

Appellees urge that the Fifteenth Amendment's specific protection of suffrage, unlike the Fourteenth Amendment's generalized prohibition of racial classifications, does not require a showing of racial motive or purpose. The Fifteenth Amendment forbids the denial or abridgment of the right to vote "on account of race, color, or previous condition of servitude." This phrase is literally broad enough to encompass state laws which operate to disenfranchise blacks as well a those which are intended to do so. The decisions of this the Court have construed the Fifteenth Amendment to include both sorts of statutes.

The proper application of the Fifteenth Amendment is well illustrated by Lane v. Wilson, 307 U.S 268 (1939). Lane involved an Oklahoma statute which provided that any resident who had not voted in the 1914 general election would have to register during a 12 day period in 1916, or be permanently barred from registration. 307 U.S. at 270-71. Subject to disenfranchisement if they failed to register during this brief period were

(a) whites eligible to vote in the 1914 elections who had failed to do so, (b) blacks eligible to vote in the 1914 elections who had failed to do so, and (c) blacks ineligible to vote in the 1914 elections because they could not satisfy the state literacy test then in effect, a test held invalid in Guinn v. United States, 238 U.S. 347 (1915) because it contained a "grandfather clause" that effectively exempted whites from the test. The court of appeals held that the statute was valid, emphasizing:

> There were probably also some whites who were qualified to vote at the 1914 elections who did not vote. They were on the same footing as to registration as were the qualified negroes. There was no distinction between them. Lane v. Wilson, 98 F.2d 980, 984 (10th Cir. 1938).

This Court agreed that the statute was neutral on its face, and did not question the motives of the legislature in adopting it, an inquiry apparently precluded by this Court's decisions of that era barring proof of legislative motivation. Arizona v. California, 283 U.S. 423, 455 (1931); see also Palmer v. Thompson, 403 U.S. 217, 224-26 (1971); United States v. O'Brien, 391 U.S. 367, 382-86 (1968).

This Court nonetheless upheld the plaintiff's claim that the law was unconstitutional because it "inherently operates discriminatorily." 307 U.S. at 274. Justice Frankfurter reasoned that the Fifteenth Amendment "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." 307 U.S. at 275. The period afforded for registration was "too cabined and confined", 307 U.S. at 276; although literally applicable to both blacks and whites, the law "operated unfairly" against blacks because of social circumstances which deterred and discouraged the unusually swift action required to protect the right to vote. 307 U.S. at 276-77.

In attaching such significance under the Fifteenth Amendment to the onerous operations of an election system, Lane was fully consistent with other opinions of this Court. In striking down the "grandfather clause", Guinn made no reference to the motives of the legislature which had adopted it, and the parties there apparently agreed that judicial consideration of such motives

would have been inappropriate. 238 U.S. at 359-61; see also 59 L.Ed.2d at 1341-43. South Carolina v. Katzenbach, 383 U.S. 301 (1966), states that the Fifteenth Amendment invalidates "state voting qualifications or procedures which are discriminatory on their face or in practice", 383 U.S. at 325, citing Lane and Guinn. Justice Harlan suggested that the Amendment covered "discriminatory . . . effect" and "unconscious" discriminatory application in Oregon v. Mitchell, 400 US. 112, 216 (1970) (dissenting opinion). Justices Marshall and Brennan took the same position in Beer v. United States, 425 U.S. 130, 149 n.5 (1976) (dissenting opinion).

Washington v. Davis noted that a failure to confine the racial classification branch of Equal Protection law to instances of purposeful discrimination "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public services, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the more affluent white." 426 U.S. at 248. Those considerations do not support a similar restriction

on the Fifteenth Amendment, since its scope is narrowly confined to the area of voting. Although the Civil War amendments are directed generally at protecting racial minorities, the Thirteenth and Fifteenth Amendments single out for emphasis the freedom of blacks from involuntary servitude and from denial or abridgment of the right to vote. A heightened degree of protection for these particular rights seems warranted in light of the special treatment accorded them by the Constitution on its face.67/

The Congress which framed the Fifteenth Amendment was not conerned merely to enable blacks to mark ballots, but to arm them with the franchise so that they could protect themselves against discrimination. That Congress regarded the franchise as "a fundamental political right,

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67/ The Thirteenth Amendment has been consistently construed to invalidate statutes which, regardless of motive, operate to facilitate the coercion of labor. Bailey v. Alabama, 219 U.S. 219, 244-45 (1911); see also Pollack v. Williams, 322 U.S. 4, 25 (1944); Taylor v. Georgia, 315 U.S. 25, 29 (1942); Clyatt v. United States, 197 U.S. 207, 216 (1905).

because preservative of all others." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1996). Senator Stewart, the leading Senate proponent of the Amendment, argued that the right to vote

> is the only measure that will really abolish slavery. It is the only guarantee against peon laws and against oppression. It is that guarantee which was put in the Constitution of the United States originally, the guarantee that each man shall have a right to protect his own liberty.68/

Congressman Shanks urged:

> No man is safe in his person or property in a community where he has no voice in the protection of either. The subjugation of his rights and liberties, the seizure and waste of his property, the degradation of his character, and the insecurity of his life are only questions of time that are not often long deferred.69/

This view was shared by numerous supporters of the Amendment,70/ who feared that with the end of

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68/ Cong. Globe, 40th Cong., 3rd Sess., p. 668.

69/ Id p. 693.

70/ Id. pp. 709 (remarks of Sen. Pomeroy), 722 (remarks of Rep. Kelley), 912 (remarks of Sen. Wilkey), 982-23 (remarks of Sen. Ross), 990 (remarks of Sen. Morton).

Reconstruction whites hostile to the Union would regain control of the Southern states and seek to strip the newly freed slaves of the rights for which the Civil War had been fought.71/ Some Republicans felt that the rights of blacks would not be secure if they could only choose among candidates of the white aristocracy which had dominated the antebellum South,72/ but Stewart and others contemplated that the right to vote would carry with it the ability of blacks to elect black officials.73/ The Amendment was intended to guard against, not only state attempts to formally "deny" blacks the right to cast ballots, but also state election schemes which "abridge" that right by so nullifying the effect of black votes as to eviscerate their value as a defense against discrimination and oppression.

The Fortieth Congress envisioned that the critical role of the Amendment would be

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71/ Id. pp. 724 (remarks of Rep. Ward), 900 (remarks of Sen. Williams).

72/ Id. p. 1626 (remarks of Sen. Edmunds).

73/ Id. p. 1627 (remarks of Sen. Wilson), 1629 (remarks of Sen. Stewart).

to protect black voters from as yet unknown forms of denial or abridgment of the right to vote. When the Amendment was passed blacks uniformly enjoyed the franchise throughout the South, which was under the control of the Union Army and the watchful eye of the Freedmen's Bureau.[74/] The concern of Congress was with possible devices and election systems which might be introduced in the South in years ahead. The prohibition against abridgement of the franchise is indicative of this concern, for there were in 1869 no practices to which "abridge" could have applied, and none is cited in the debates; the term was evidently included to encompass possible forms of partial disenfranchisement that might emerge in the future.

The election system in operation in Mobile strikes at the very heart and purpose of the Fifteenth Amendment. In form blacks are able to mark and cast ballots, but in substance they are disenfranchised. They cannot elect any black to the city commission. They cannot elect to the

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74/ Id. pp. 724 (remarks of Rep. Ward), 979 (remarks of Sen. Frelinghuysen), 981 (remarks of Sen. Frelinghuysen), 984 (remarks of Sen. Ross).

commission any white known to support fair treatment for the black community. And they cannot protect themselves against a pervasive policy of discrimination which runs rampant through the operations of the city government. In the district court the defendants proposed[75/] that an appropriate remedy for this situation would be for the court to engage in ongoing monitoring and supervision of every city agency to detect and redress any act of discrimination. Neither principles of federalism nor considerations of comity recommend such federal receivership. The Constitution requires that an effective franchise be conferred on blacks so that they can protect themselves against government discrimination. Mobile's election system must be modified to do so.

75/ Defendants Proposed Plans, p. 2.

V. THE DISTRICT COURT CORRECTLY FORMULATED A REMEDY FOR THE PROVEN VIOLATION

The Jurisdictional Statement contains a question regarding the remedy fashioned by the district court, J.S. 4, but it is not included in the Questions Presented in the Brief for Appellants, pp. 3-4. Neither the body of the Jurisdictional Statement, nor the Brief for Appellants discusses that question. We contend that the district court acted properly in formulating a remedy.

As the court of appeals noted, the defendants in the district court, despite the finding of a violation, "refused to come forward with a plan, forcing the district court to fashion a remedy."[76/]

76/ At the end of the trial the court ordered the parties to submit proposed plans in the event that the court found the at-large system unconstitutional. The defendants responded by proposing several "plans," such as denying any injunctive relief but retaining jurisdiction, all of which contemplated electing all commissioners at-large. Proposed Plans of Defendants, pp. 2-4 (filed September 8, 1976). This recalcitrant response constituted neither a "plan" relevant to Wise nor compliance with the district court's order.

J.S. 13a. Under that circumstance it was the obligation "of the federal court to devise and impose a reapportionment plan." Wise v. Lipscomb, 57 L.Ed. 2d 411, 417 (1978). Manifestly some alteration of Mobile's method of election was required to remedy the proven violation, and Chapman v. Meier, 420 U.S 1 (1975), required the district court in fashioning its own plan to use only single-member districts.

The district court's problems were further aggravated by the fact that the defendants adamantly opposed electing commissioners from single-member districts,[77/] even though commissioners are chosen in this manner in a number of other cities.[78/] Defendants also indicated

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77/ A. 33; Tr. 348-50, 1149-53.

78/ All the commissioners are chosen from single-member districts in Harrison, Hatfield, Nether Providence and Ridley, Pennsylvania. All but one of the commissioners in Weehawken, New Jersey, Vicksburg, Mississippi, and Ottawa, Illinois are chosen from such districts. Municipal Yearbook, 1978, pp. 18, 26, 30, 36-37.

that, if there were to be single-member district elections, they preferred to change the form of Mobile's government to a mayor-council plan.

Anxious to induce the defendants to play some constructive role in the preparation of a plan, the district court persuaded the city to nominate two members of a three member advisory committee to propose a remedy. The committee proposed a plan based on the mayor-council form of government in force in Montgomery, an Alabama city comparable in size to Mobile. After submission of this proposal the court invited and received comments on the plan from both counsel for the parties and other elected officials from Mobile. The district judge adopted the plan with some modifications based on those comments. Ever concerned to avoid any unnecessary intrusion into state and local affairs, the district judge also expressly provided that the legislature could at any time replace the court approved plan with any other "constitutional form of government for the City of Mobile," and could authorize the city itself to do so. J.S.

3d. The legislature, however, has never acted to adopt or authorize any other reapportionment plan.

We noted earlier that the district court did not condemn the use of the commission form of government throughout the country or even elsewhere in Alabama. The district court's order does not even forbid Mobile itself to adopt a variant of the commission system. Mobile could, with appropriate authorization by the legislature, adopt a commission form of government under which, as in other states, all or most commissioners were chosen from single-member districts. The city might also create a city council with members elected from both single member and at-large districts and provide that the at-large members would hold the executive power of the government. See Wise v. Lipscomb, 57 L.Ed.2d 411 (1978).[79/] Mobile and Alabama thus remain free to use "many innovations, numerous combinations of old and

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79/ Whether such a scheme would be constitutional would depend, inter alia, on the number of single and multi-member seats.

new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions." Holt Civic Club v. City of Tuscaloosa, 47 U.S.L.W. 4008, 4012 (1978).

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

J.U. BLACKSHER
LARRY MENEFEE
1407 Davis Avenue
Mobile, Alabama 36603

EDWARD STILL
Suite 400
Commerce Center
2027 First Avenue North
Birmingham, Alabama 35203

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Appellees

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,
Appellants,

v.

WILEY L. BOLDEN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

C. B. ARENDALL, JR.
WILLIAM C. TIDWELL, III
TRAVIS M. BEDSOLE, JR.
Post Office Box 123
Mobile, Alabama 36601

FRED G. COLLINS
City Attorney
City Hall
Mobile, Alabama 36602

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR
MARTIN W. MATZEN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for Appellants

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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REPLY BRIEF FOR APPELLANTS

This Brief responds to the Brief for the Appellees in No. 77-1844,[1] and to the Briefs of the United States (in Nos. 77-1844 and 78-357)[2] and the Lawyers' Committee for Civil Rights Under Law in No. 77-1844[3] as *Amici Curiae.*

ARGUMENT

At the outset, and in light of the attempt of the Appellees to broaden the issues in this case without preserving issues by cross-appeal, it is necessary to establish what is — and what is not — involved in this particular case. This is a Fourteenth Amendment case solely. Issues under the Fifteenth Amendment[4] and §2 of the Voting Rights Act, 42

[1]Cited Appellee Br., p. ____.

[2]Cited U.S. Amicus Br., p. ____.

[3]Cited Lawyers' Comm. Amicus Br., p. ____.

[4]Appellees continue to argue that a showing of purpose is not necessary to a dilution claim under the Fifteenth Amendment, because *Washington v. Davis*, 426 U.S. 229, did not expressly overrule *dicta* in

(footnote continued on next page)

U.S.C. §1973,[5] were rejected by the Court of Appeals below and have not been cross-appealed.[6]

The attempt by the Appellees and their *Amici* to add in their defense of the judgments of the courts below issues rejected by the courts below, merely indicates the fear of the Appellees and *Amici* of resolution of the Fourteenth Amendment voting issue, the sole issue to which we devote the balance of this reply.

The Defendants below were four: the City of Mobile and its 3 incumbent Commissioners.[7] Neither the State of Alabama nor any of its Legislators officially or personally were joined. Thus, the focus of this case is whether the incumbent City Commissioners created or maintained, with racially discriminatory intent, an obstacle to full black participation in City at-large elections.

(footnote continued from previous page)

Fortson v. Dorsey, 379 U.S. 433. This contention, rejected by the Fifth Circuit in its opinion in the companion case of *Nevett v. Sides*, 571 F.2d 209, 217-221 (5th Cir. 1978), *pet. cert. filed*, No. 78-492, which was incorporated in its opinion in this case, is both frivolous in light of *United Jewish Organizations v. Carey*, 430 U.S. 144, 166-67, and not the subject of any cross-appeal. See *Brennan v. Arnheim and Neely, Inc.*, 410 U.S. 512, 516; *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 665, 660-61 (Appellees not permitted absent cross-appeal to raise issues resolved against them below).

[5]Appellees' assertion that §2 of the Voting Rights Act affords them a purpose-less cause of action for dilution was also properly rejected by the Court of Appeals below (571 F.2d at 242 n. 3; Juris. St. 4a-5a) as without foundation in any precedent. That section only recites the language of the Fifteenth Amendment. Section 5 of the Act, 42 U.S.C. §1973c, which speaks of purpose and effect in the disjunctive, has no application to the maintenance of at-large Commission elections in Mobile. No cross-appeal has been taken on this point either.

[6]Similarly, not before the Court is Appellees' attempt, Br. 37, to argue that, contrary to the decision below, intent is not required under the Fourteenth Amendment or Fifteenth Amendment, Br. 53, 82.

[7]App. 17.

The Amicus brief of the United States merges the City (No. 77-1844) with the County School Board (No. 78-357); but the facts of the two cases are different, the electoral processes are different[8] and the administration of each is different.[9]

The City case must be decided on its own facts.

Since there is no obstacle to full black participation *within* the at-large system[10] in the City of Mobile, the Appellees must divert their attention to the maintenance of the at-large system itself.[11]

Since the record reflects no maintaining action (or inaction) by the City Commissioners, the Appellees must divert their attention to the actions of State Legislators.[12]

There is nothing in the record to suggest — and Appellees do not argue — that any Mobile Commissioners

[8]The City of Mobile has non-partisan elections. The only slating organization of record below is the local branch of the National Association for the Advancement of Colored People, the Non-Partisan Voters League (NPVL). The NPVL endorsed the two white incumbent City Commissioners who were opposed in the most recent City election.

The County School Board is elected in partisan elections at-large. The Alabama Legislature is elected in partisan elections from single-member districts.

[9]The City Commissioners are both legislators and administrators. The County School Board appoints an administrator whose tenure and duties would not be affected by either affirmance or reversal in No. 78-357. In contrast, affirmance in No. 77-1844 will give effect to the 60-page order (Juris. St. 1d-63d) establishing an entire and entirely new administrative structure for the City of Mobile.

Therefore, the City is, both factually and constitutionally, different from both the County School Board in No. 78-357 and the State Legislature. See Opposition to Mot. to Affirm (No. 77-1844), pp. 1-5.

[10]Cf., *White v. Regester*, 412 U.S. 755, 767.

[11]All agree that an at-large electoral system is not *per se* unconstitutional. Appellee Br., pp. 40-42; Lawyers' Comm. Amicus Br., p. 4; U.S. Amicus Br., p. 41.

[12]Appellee Br., pp. 21-24.

were involved in the proposal or defeat of any special electoral legislation[13] concerning Mobile, cited throughout Appellees' Brief.

So, at bottom, Appellees are left only with their next argument, set out in their Brief, pp. 24-25:

> "No black has ever been elected to the at-large commission, and no black has ever won any at-large election in Mobile City. . . ."[14]

Thus, Appellees — and the Amicus Lawyers' Committee[15] — have only the argument that Appellees heretofore[16] have avoided: that the evil is the at-large system itself and the description of the evil is the failure of the at-large system to guarantee black Mobilians proportional representation by race.

The Appellees urge this Court to correct the evil by declaring a constitutional right in each voter to be represented by one of his own race, and a corresponding constitutional obligation in all local governments to constantly restructure themselves so as to insure this result.[17]

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[13]The Appellees then quote from *Arlington Heights*, 429 U.S. 252 (Appellee Br., p. 24). The legislative intent on which the Court in *Arlington Heights* focused was that of the defendant Village Board. By analogy to their argument in this case, Appellees would see the proper focus in *Arlington Heights* to be the state legislature in Springfield in authorizing the village to make zoning decisions at all.

[14]But the United States admits, Br., pp. 43, 88, that no inference arises solely from the failure to elect blacks.

[15]Lawyers' Comm. Amicus Br., pp. 9-10.

[16]See Mot. to Affirm, p. 5.

[17]A logical implication of Appellees' position is a right in white citizens to resist maintenance of at-large elections where the black voting population approaches 50%. Cf., the companion case *Nevett v. Sides*, 571 F.2d 209, 214 n. 6 (5th Cir. 1978), *pet. cert. filed*, No. 78-492. In that circumstance, white voters would claim a Fourteenth Amendment right to proportional representation by race.

This retrenchment of position forces Appellees and Amici to oppose this Court's decisions in *Whitcomb v. Chavis*, 403 U.S. 124, *White v. Regester*, 412 U.S. 755, and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, which hold that the focus of a constitutional voting rights[18] case is racial equality of electoral access and participation rather than electoral result, and that states are permitted — but not required — to provide systems which guarantee proportional representation. It leaves Appellees arguing that this Court did not mean what it said in those cases, and urging a license for District Courts such as the one below to dispense with meaningful findings concerning concrete impediments to effective black electoral participation in favor of speculation about the causes and cures for the failure of any qualified black to run for City Commissioner in Mobile, notwithstanding black success at-large elsewhere.[19]

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[18]Appellees proffer an ill-conceived analogy (Br. 61) between the sort of claim they raise and the one-person, one-vote claim governed by the rule of *Reynolds v. Sims*, 377 U.S. 533. They urge that at-large elections "underweight" black votes. A *Reynolds*-type redistricting cures the evil that, proportionally, voters are not represented *by anyone*. But Appellees' class is underpresented only insofar as a black must be represented *by a black*. At-large elections, of course, are a mathematically perfect remedy for the one-person, one-vote problem. See, *e.g.*, *Zimmer v. McKeithen*, 485 F.2d 1297, 1301 (5th Cir. 1973) (en banc); *aff'd sub nom. East Carroll Parish Sch. Board v. Marshall*, 424 U.S. 626 (at-large plans have "zero population deviation").

[19]See Appellants' Br., p. 11 and n. 14.

I

NO ELECTORAL OBSTACLE, INTENTIONAL OR OTHERWISE, TO FULL BLACK ELECTORAL PARTICIPATION IS PRESENT IN THIS CASE.

This brings us to the quality of evidence which the Appellees and *Amici* cite in defending the analysis of the Courts below. The evidence is a search for a substitute for that electoral obstacle which the Fourteenth Amendment requires be proved, and whose existence the record in this City case precludes.

The Appellees thus seek a form of license for district judges to eschew evidence in favor of judicial notice as local residents.[20] If such license is given by this Court, there is neither need nor ability in appellate courts to review the local federal judicial soothsayers.

However, a review of the evidence in this case reveals a complete absence of any voting obstacle and a complete absence of evidence of discriminatory intent by the Mobile City Commissioners.

Appellees recount (Br., p. 75) the District Court's "finding" that Mobile blacks are denied access to the political process because they are deterred from candidacy by the certain prospect of defeat. The finding is hinged on the existence of a phenomenon of white bloc voting, which as the United States points out (U.S. Amicus Br., pp. 12-17), was discerned not on the basis of any head-to-head contest between black and white Commission candidates (because, as the District Court found, there have been no serious or

[20]"In conducting the 'sensitive inquiry' contemplated by *Arlington Heights*, the district judge [in No. 77-1844] was able to bring to bear an understanding of local political, legislative and racial realities born of years of legal, judicial and practical experience in the state." Appellee Br., p. 35.

able black candidates for Commission seats)[21] but on an assessment of the electoral experience of a white candidate, Joseph Langan, known to espouse civil rights causes and attract solid support from blacks.[22] The District Court, contradicting the candidate's own explanation (App. 111-15), conjectured that his defeat in a 1969 bid for a fifth consecutive Commission term must have been attributable to white backlash generated by the extent of his black support. The District Court, ignoring statistical evidence and expert testimony that more recent City Commission elections had shown little racial polarization (App. 503-07), elevated the so-called backlash to the status of a "usual" pattern. 423 F. Supp. at 388, Juris St. 8b. Even the United States concedes (U.S. Amicus Br., p. 16) that "race was not a factor" in any subsequent City Commission election.

[21]Appellees attack (Br., p. 75) this negative description of the candidacies of those (3) blacks who have run as merely Appellants' view. It was, however, the finding of the District Court. 423 F.Supp. at 388, Juris. St. 8b. Cf., for partisan elections to the County School Board in No. 78-357, the discussion at U.S. Amicus Br., pp. 15-17, and 423 F.Supp. at 388.

The City does *not* agree to the Solicitor General's intertwining of the facts and law as to the political processes of the City with those of the State Legislature, the Mobile County Government, and the Mobile County School Board, all of whom have partisan primary elections and a factual and legal record of their own which is inapplicable to the record of the City of Mobile. Insofar as the Solicitor General attempts to ignore this fact he falls into the errors of the District Court and the Court of Appeals below, who, finding no evidence of intent adverse to the City of Mobile, reached out and applied to the City the experience and differing political processes of the County, School Board and Legislature.

The Appellees go even further, by adopting findings from other cities and other states. Br., p. 31-32.

[22]The District Court also relied for this conclusion on its own intuitive understanding of "common knowledge." (App. 65-67) Cf., *Palmer v. Thompson*, 403 U.S. 217, 224-26, where reversal was urged unsuccessfully on the basis of common knowledge that the City of Jackson, Mississippi had closed its swimming pools in order to avoid the necessity of integration.

It is hardly undisputed (contrary to the United States' suggestion, Amicus Br., p. 12) that "no . . . candidate identified with blacks has ever won an at-large election for any office in or for the city. . . ." As we pointed out,[23] in the City of Mobile, blacks participate vigorously in the electoral process, identifying their preference principally through the Non-Partisan Voters League, the only slating organization active in the City's nonpartisan elections.[24]

Appellees disparage (Br., p. 80) the impact of the NPVL's endorsement by arguing that in 1973 Commissioner Greenough's opponent, Bailey, actually received a greater share of the black vote in the City election. This attempt to fill the vacuum in the District Court's analysis only does it further damage: Bailey was the candidate who had defeated Langan in the 1969 City Commission contest so

[23]Appellants' Br., pp. 9-10.

[24]The distinction between this case and *Chavis* is that there qualified blacks ran rather than slated whereas here qualified blacks slated rather than ran.

To give effect to this distinction is to hold that the only defense for a City is to guarantee electoral victory by black candidates, qualified or not. This Court would have to hold that no white Commissioner — not even those endorsed by Mobile's black leadership — is capable of fairly administering a government for black Mobilians. (See App. 143).

This Court has ruled precisely to the contrary in *Dallas County v. Reese*, 421 U.S. 477, and *Dusch v. Davis*, 387 U.S. 112.

As the Joint Center for Political Studies points out in commentary on its roster of black elected officials, effective black political participation *cannot* be measured simply by a count of black elected officials:

> "Black political progress can be monitored in as many different ways as there are avenues of political activity. Public officeholding is only one of the many ways in which blacks may impact the political arena. Others include voter registration; voting; membership in political parties or other political organizations; service in appointive office; and active support of and/or opposition to issues and candidates." *National Roster of Black Elected Officials*, Joint Center for Political Studies, Volume 8 at xiv (1978).

crucial to the District Court's theory about polarization and backlash, a theory which posited Bailey to be anathema to the black community.

The only real safeguard against such *ex cathedra* "findings" by the district courts is a realistic requirement that plaintiffs in such dilution cases as this prove the present existence in the City's voting or political processes of some identifiable barrier to effective black participation, and that the identified barrier is the result of an impermissible racial purpose in the City's incumbents.[25]

[25]The Appellees see the gravamen of this case, not as the existence *vel non* of an obstacle to full electoral participation, but the mere existence of bloc voting. (Br., pp. 46-50, discussing *White v. Regester* and *Whitcomb v. Chavis*. See also, Appellee Br., pp. 69-70). Neither *Amici* nor Appellees make any attempt whatsoever to reconcile this view with this Court's decision in *United Jewish Organizations, supra*, that neither the Fourteenth nor the Fifteenth Amendment touches the outcome of elections, even where the regular outcome is minority defeat occasioned by racially polarized voting. 430 U.S. at 166-67. Their putative distinction of *Chavis* (defeats explained by partisan rather than racial voting) was explicitly rejected in *United Jewish Organizations*, 430 U.S. at 166-67. Their argument (Br. 7, 44-46) that *Regester* turned on the effects of racial voting, rather than the existence of exclusionary slating and registration (absent here) suffers from the same infirmity. *Id.* The Appellees summarize:

> "The franchise is a valuable right because it can be exercised to decide 'issue-oriented elections.' [citation omitted] But that right is rendered nugatory if candidates are regularly defeated, not because of their ideas or ideology, but because of the color of their skin or of that of their supporters." Appellee Br., p. 49.

This analysis requires findings which the social scientists in this case said could not be made. The first is a finding that candidates are defeated *because of* their race. Statisticians and political science experts steadfastly deny that their regression analyses admit of such causal proof. (App. 60-61). They would express an inability to distinguish this causation from that partisan or "issue-oriented" defeat which Appellees, Br., p. 53, endorse. Moreover in this case where there were no qualified black candidates, Appellees must assert that Com-

(footnote continued on next page)

The most chimerical of the findings in this case concern the discriminatory intent which this Court has held necessary to a Fourteenth or Fifteenth Amendment claim in *Washington v. Davis*, 426 U.S. 229; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252; and *United Jewish Organizations, supra*, 430 U.S. at 166-67.

The United States, Amicus Br., p. 38, says:

> "[T]he claimed justification for at-large voting was essentially that it produced political representatives with a broad, rather than a parochial, view. But where, as in these cases, voting is strongly polarized along racial lines, the broad view is likely to be simply the view of the majority racial group."

This passage is offered to prove discriminatory intent in the maintenance of the Commission form of government. Yet, it assumes the missing premise, an assumption not even the Fifth Circuit below makes. The missing premise is that political representatives are capable of representing only themselves, their party or their race.

(footnote continued from previous page)

missioner Langan was defeated — after being reelected for 16 years — not by *his* race, but by the race of *some* of his supporters. Lacking evidence of qualified black candidates, Appellees cite to a finding that the at-large system itself must "discourage" qualified blacks from running. Appellee Br., pp. 75-76. To attempt to psychoanalyze not only the candidates but every voter in Mobile in this fashion is ludicrous.

These are the findings which must be given effect if the judgment below is to be affirmed. Appellants feel that findings of this character are beyond the competence of any court, when the social science experts called by plaintiffs refuse to indulge in them.

But outlandish findings are not needed in a proper vote dilution case. Where the intentional creation or maintenance of an electoral obstacle is proved, the case proceeds in a competent and reviewable fashion.

Amicus offers this assumption as an *ipse dixit*. Yet, if true in a particular case, it is susceptible of proof: declining to seek or accept black endorsement, and eschewing the black vote, as well as the exclusion of any black input into the nominating process. Thus, the missing premise was *proved* in *Regester*.[26]

That proof is lacking here: the record of the City case is exactly contrary to the premise. The record reflects campaigning for black endorsement, and the decisive quality of that endorsement in City elections. (App. 141-42).

The evidence of racial intent upon which the District Court below ordered a new City administrative structure and on which the Court of Appeals affirmed the disestablishment of Mobile's Commission form of government, was that the Alabama Legislature had on two occasions rejected authorization of a mayor-council, part single-member district system for Mobile, and had been conscious of the likelihood that such a measure would have enhanced black candidates' chances of election. The repository of the only suggested "inactive maintenance" intent,[27] the State Legislators, are elected from single-member districts, specifically the 11-member Mobile County delegation to the House.[28] The United States neglects to mention that 3 of these 11 districted State legislators are black. See 423 F.Supp. at 389.[29]

There is *no* other electoral system under which the City of Mobile can preserve its own and entirely separate, strong *local* governmental interest.

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[26] See also *Nevett v. Sides*, 571 F.2d 209, 222 (5th Cir. 1978), *pet. cert. filed*, No. 78-492.

[27] See U.S. Amicus Br., pp. 23, 28.

[28] *Ibid.*

[29] Juris. St. 10b.

There is real irony in the fact that Mobile was faulted by the Courts below because its 70-year-old at-large Commission Government was not changed by the Legislature to one which gave blacks a better chance to elect black officials. For the Voting Rights Act itself was designed and intended to make electoral changes difficult, indeed "freezing election procedures . . . unless they can be shown to be nondiscriminatory" was the purpose noted by this Court in *Beer v. United States*, 425 U.S. 130, 140.

During the pendency of this litigation (App. 255), Alabama State Senator Roberts introduced legislation to change the City's government to a mayor-council plan in which seven councilmen were to be elected by single-member district, with two members of the council plus the mayor to be elected at-large. (App. 249-50). The "major reason" for its introduction was the Senator's belief that this would be "a better form of government." (App. 251). He acknowledged that this was a view as to which "reasonable men may reasonably differ" (App. 261), and had attempted to alleviate somewhat the "tendency" of councilmen "to be concerned just with their particular district" by providing two at-large seats. (App. 253). The Senator also felt that he had written the bill in such a way as to eliminate "interference" by councilmen with parochial concerns "in the day to day operations of the City." (App. 259). Senator Roberts did not testify that his bill failed to pass for reasons other than racially neutral legislative disagreement with its policies and effectiveness. (App. 258).

Though the United States as *Amicus* now urges (Br., pp. 96-97) that some variant of the entirely at-large Commission might have been adopted to retain its key feature of at-large officials with mixed legislative/administrative functions, it is clear that the Attorney General has longstanding objections to the retention of at-large elements in any electoral change subject to the Voting Rights Act. Even now the United States is resisting the Dallas 8-3 plan with

which this Court dealt in *Wise v. Lipscomb*, ____ U.S. ____, 98 S. Ct. 2493, with the assertion that retention of 3 at-large seats is suggestive of impermissible racial purpose. Memorandum in Response to Plaintiffs' Motion for Summary Judgment, pp. 24-28, in *City of Dallas v. United States*, Civil Action No. 78-1666 (D.D.C.).

There is no reason to suppose that anything less than a fully single-member districted plan for the City of Mobile (e.g., the plan proposed by Senator Roberts) would have been satisfactory to the United States if it had been adopted by the Alabama Legislature.

The United States insists on proportional representation by race.

Quite apart from the fact that the evidence showed that much of the debate in the Alabama Legislature in this case centered on the relative merits of the two forms of government, Appellees' flagrant hyperbole[30] misses the mark because the issue in the case is the intent of the Mobile City Commission, not the intent of the non-party State of Alabama or its Legislature.[31]

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[30]Appellees characterize this as "two affirmative and express legislative decisions" (Br., p. 35) and say that this proves that the Legislature "acted from racial malice" (Br., p. 36) so stark as to come within the ambit of *Gomillion v. Lightfoot*, 364 U.S. 339 (Br., p. 18). Cf., *Palmer v. Thompson*, 403 U.S. 217, 224.

[31]Amicus Lawyers' Committee proffers a theory to fill this gap: that the Mobile Commission knew that at-large elections unconstitutionally deprive blacks of a right to proportional representation because "public officials in the South can hardly claim to be unaware" of that fact. (Br., pp. 15, 19). Neither Court below, obviously, was willing to extend the "recognized effect" theory (rejected in both *Washington v. Davis*, 426 U.S. at 252, and *Arlington Heights*, 429 U.S. at 260) quite that far. The argument is also diametrically at odds with the position taken by Appellees (Br., pp. 68-69, 70-71) that the at-large successes of blacks around the country are not relevant to the Mobile City case.

There was no claim of any "discriminatory maintenance" on the part of the City Commissioners or candidates, and no showing even of any peripheral involvement of City officials in the Legislature's treatment of these two bills.

Rather, the Commissioners' interest in this case is in retaining the Commission form itself. That form of government is necessarily elected at-large. The strong governmental interest in retaining a system where named administrators are elected by, and responsible to, all Mobilians exercising equal votes, is detailed at Juris. St., pp. 9-10. This interest is not replicated in any other case before this Court, today or in *Chavis* or *Regester*.

Even assuming, however, that the transactions in the Alabama Legislature are a salient consideration here, they reveal no unconstitutional purpose whatever. At most they embody a refusal to implement an "affirmative action" measure that is constitutionally permissible but not constitutionally required.

CONCLUSION

The principle on which Appellees' case rides is the one rejected in *United Jewish Organizations*. The distillate of their lengthy brief and of the opinions below is this:

> "White voters are entitled to cast their ballots on any basis they may please, including that of race. But they are not entitled to have the State maximize the impact of racially based votes by means of at-large elections." (Br., p. 50).

Appellants say that this stands the rule clearly articulated in *Chavis*, *Regester*, and *United Jewish Organizations* precisely upside down. Minority groups are not entitled to have the state maximize and concentrate their voting strength so as to guarantee electoral victories. A constitutional vote dilution case stands ready to eliminate

clearly identified obstacles created or maintained by the Mobile Commissioners to full black electoral participation.[32] When the lack of an electoral obstacle is admitted — as it has been here — Mobile's Commission form should be permitted to continue.

Respectfully submitted,

C. B. ARENDALL, JR.
WILLIAM C. TIDWELL, III
TRAVIS M. BEDSOLE, JR.
Post Office Box 123
Mobile, Alabama 36601

FRED G. COLLINS
City Attorney
City Hall
Mobile, Alabama 36602

CHARLES S. RHYNE
WILLIAM S. RHYNE
DONALD A. CARR
MARTIN W. MATZEN
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Counsel for Appellants

[32] We have pointed out that remedies exist for the other evils adumbrated by Appellees: employment, municipal services, racial terrorism, school segregation. See Appellants' Br. p. 16 n. 19.

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JUN 11 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, et al.,
Appellants,

v.

WILEY L. BOLDEN, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

NORMAN REDLICH
Trustee

FRANK R. PARKER
Staff Attorney
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
720 Milner Building
210 South Lamar Street
Jackson, Mississippi 39201
(601) 948-5400

ROBERT A. MURPHY
Staff Attorney
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Appeal from the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law, proposed *amicus curiae* herein, respectfully seeks leave of this Court to file the attached brief in order to assist the Court in resolving the constitutional questions presented in this voting rights case.

As set forth in the attached brief, the Lawyers' Committee has been intimately involved for a number of years in voting rights litigation on behalf of minority-race voters, and we have participated, both as *amicus*

curiae and as the representative of parties, in many of this Court's important voting rights cases. The instant case is of particular concern to us, involving the effect of at-large voting schemes on the participation of minority voters in the electoral process. We bring to this case a familiarity with, and understanding of, the applicable decisions of this Court. We also bring to this case—as a result of our extensive litigation in this area—a close familiarity with the exclusionary purpose and effect at-large municipal voting has had on minority participation in municipal government, particularly in the South where most of our litigation has taken place. By filing this brief, we wish to present to the Court a perspective based on our litigation experience in the South which is not likely to be presented by any of the parties.

Appellees have consented to the filing of this brief. Consent was sought from appellants, but not granted.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves that its brief *amicus curiae* be filed in this case.

January 10, 1979.

Respectfully submitted,

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

NORMAN REDLICH
Trustee

FRANK R. PARKER
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
720 Milner Building
210 South Lamar Street
Jackson, Mississippi 39201
(601) 948-5400

ROBERT A. MURPHY
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Amicus Curiae

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IN THE

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On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many of the Nation's leading

lawyers. Through its national office in Washington, D.C., and offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, employment, education, housing, municipal services, the administration of justice, and law enforcement.

In the past, the Lawyers' Committee has filed briefs *amicus curiae* by consent of the parties or by leave of this Court in a number of important civil rights cases. The interest of the Lawyers' Committee in this case arises from its dedication to and interest in the full and effective enforcement and administration of the Nation's constitutional and statutory provisions securing the voting rights of minorities. As a result of providing legal representation to litigants in voting rights cases for the past thirteen years, the Committee has gained considerable experience and expertise in problems of racial discrimination relating to the voting rights of minority citizens, and in the requirements and guarantees of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. Attorneys associated with the Lawyers' Committee represented the minority plaintiffs in two of the first four cases to reach this Court on the scope of the requirements of § 5 of the Voting Rights Act of 1965, *Fairley* v. *Patterson* and *Bunton* v. *Patterson*, decided *sub nom. Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), and have provided continuing representation since 1970 to the plaintiff voters in the Mississippi state legislative reapportionment case, in which this Court has rendered five decisions in this decade, the latest of which was *Connor* v. *Finch*, 431 U.S. 407 (1977). The Committee also represented the minority voters in *City of Richmond* v. *United States*, 422 U.S. 358 (1975); and, we filed *amicus* briefs in *Wise*

v. *Lipscomb*, No. 77-529 (June 22, 1978); *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976), and *Georgia* v. *United States*, 411 U.S. 526 (1973).

In this case the Committee is interested in (1) the constitutional and Federal statutory implications of the exclusion of minority representation in municipal government by at-large municipal voting in majority white communities, (2) the applicability to at-large municipal elections, of the principles announced by this Court in *White* v. *Regester*, 412 U.S. 755 (1973), that at-large voting unconstitutionally dilutes black voting strength when blacks have been denied equal access to the political process, and (3) the question of the applicability of the racial purpose requirements to an at-large municipal voting system which has been in effect for a long time. In addition, attorneys associated with the Jackson, Mississippi office of the Lawyers' Committee currently have pending four cases challenging at-large municipal elections for city council members, and the decision of the Court in this case is likely to have a direct impact on the decisions in those cases.

Because of our extensive and intimate involvement in voting rights cases involving state legislatures, counties, and municipalities, our extensive knowledge of the case law in the area, and our familiarity with the exclusionary purpose and effect at-large municipal voting has had on minority participation in municipal government, particularly in the South, we have a perspective on this case which has not been presented by the petitioners, and which will not be presented in its entirety by the respondents.

The Lawyers' Committee therefore files this brief as friend of the Court urging affirmance of the judgment below.

DISCUSSION

I. AT-LARGE ELECTIONS IN MUNICIPALITIES IN WHICH MINORITY VOTERS HAVE BEEN DENIED EQUAL ACCESS TO THE POLITICAL PROCESS AND IN WHICH MINORITY VOTERS HAVE HAD LESS OPPORTUNITY THAN WHITES TO ELECT CITY COUNCIL MEMBERS OF THEIR CHOICE UNCONSTITUTIONALLY DILUTE, MINIMIZE, AND CANCEL OUT BLACK VOTING STRENGTH.

While at-large elections are "not per se illegal under the Equal Protection Clause," *Whitcomb* v. *Chavis*, 403 U.S. 124, 142 (1971), the Court has repeatedly held that at-large voting is unconstitutional when "designedly *or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." (emphasis supplied) *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *accord*, *Dallas County* v. *Reese*, 421 U.S. 477, 480 (1975); *White* v. *Regester*, 412 U.S. 755, 765 (1973); *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143. In *Fairley* v. *Patterson*, decided *sub nom. Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969), the Court in considering whether a switch to at-large county supervisor elections was subject to Federal preclearance under § 5 of the Voting Rights Act of 1965 held:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

In many parts of the South—and possibly elsewhere—at-large elections "designedly or otherwise" are the last vestige of racial segregation in voting.[1] Although blacks and other minorities in the South are now permitted to register and vote in large numbers—primarily as a result of the Voting Rights Act of 1965—at-large elections which dilute minority voting strength "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."

In *White* v. *Regester*, 412 U.S. 755, 766 (1973), *aff'g in relevant part*, *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court), the Court held that at-large elections unconstitutionally dilute minority voting strength when plaintiffs have produced

> evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in ques-

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[1] WASHINGTON RESEARCH PROJECT, THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH 109-26 (1972); UNITED STATES COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION 21-25 (1968); *see also* Carpeneti, *Legislative Apportionment: Multi-Member Districts and Fair Representation*, 120 U. Pa.L. Rev. 666 (1972); Banzhaf, *Multi-Member Electoral Districts—Do they Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966). There can be no doubt that in some instances at-large municipal elections have been instituted for purposes of discrimination, e.g., *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) (1962 Mississippi statute requiring switch to at-large municipal voting held unconstitutional as racially motivated). In other instances, the justification advanced is to eliminate ward politics and to promote government reform, but the effect on minority participation is equally discriminatory:

> In a fundamental sense, the Black American has fallen victim of governmental reform. In their zeal for efficiency, democratic government, and the elimination of corruption, the reformers have led us to new political systems which operate to the detriment of minority groups.

Sloane, *"Good Government" and the Politics of Race*, 17 SOCIAL PROBLEMS 156, 174 (1969).

> tion—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

White held at-large voting for the Texas Legislature in Dallas County unconstitutional on a showing of (1) "the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes"; (2) Texas law "requiring a majority vote as a prerequisite to nomination in a primary election"; (3) the "so-called 'place' rule limiting candidacy for legislative office from a multi-member district to a specified 'place' on the ticket"; (4) since Reconstruction, only two black candidates from Dallas County had been elected to the House of Representatives, and these were the only two blacks ever slated by the white-controlled Dallas Committee for Responsible Government (DCRG); and (5) the DCRG did not require the support of black voters, and "did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community." 412 U.S. at 766-67.

The Court made similar findings with respect to Mexican-American voters in Texas. The Court found that the Mexican-American community of Bexar County (San Antonio) was effectively removed from the political processes on proof that it "had long suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others"; that the state poll tax and restrictive voter registration procedures had foreclosed effective political participation; and that "the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests." *Id.* at 767-69. Single-member legislative districts were required "to remedy 'the effects of past and present discrimination against

Mexican-Americans' . . . and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities." *Id.* at 769.[2]

White is the first case in which this Court struck down at-large voting—there in multi-member legislative districts—for unconstitutional dilution of minority voting strength. But in *Wise* v. *Lipscomb*, 46 U.S.L.W. 4777, 4781 (U.S. June 22, 1978) (No. 77-529), four Justices noted that the Court had not yet decided whether the principles of *White* v. *Regester* were applicable to municipal governments. We believe that they are, and that no significant distinction can be made between at-large legislative voting and at-large municipal voting.

First, every Court of Appeals which has been presented with the issue has held the principles of *White* equally applicable to at-large voting in county and municipal government, and has sustained or rejected dilution challenges to local at-large voting depending on

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[2] The District Court's judgment affirmed by this Court also rested on evidence of racial bloc voting, 343 F. Supp. at 731, 732:

> The population of the West Side of San Antonio tends to vote overwhelmingly for Mexican-American candidates when running against Anglo-Americans in party primary or special elections, to split when Mexican-Americans run against each other, and to support the Democratic Party nominee regardless of ethnic background in the general elections. The record shows that the Anglo-Americans tend to vote overwhelmingly against Mexican-American candidates except in a general election when they tend to vote for the Democratic Party nominee whoever he may be although in a somewhat smaller proportion than they vote for Anglo-American candidates. * * * It is not suggested that minorities have a constitutional right to elect candidates of their own race, but elections in which minority candidates have run often provide the best evidence to determine whether votes are cast on racial lines. All these factors confirm the fact that race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities.

whether or not the *White* criteria had been met on the facts of each individual case. Thus, the *White* v. *Regester* criteria have been applied to local at-large voting challenges by the First,[3] Fifth,[4] Sixth,[5] Seventh,[6] and Eighth [7] Circuits.

Second, the reasoning of the Court's decision in *White* v. *Regester* is sound, and there is no good reason to limit its application to at-large legislative elections. Where—as in this case (423 F. Supp. at 393-94)—the election law of the State applicable to municipal elections requires at-large, citywide voting, city council members must receive a majority vote for nomination or election, and candidates are restricted to a place or number on the ballot, blacks are effectively excluded from the opportunity to elect candidates of their choice to city government in majority white communities where racial bloc voting prevails—not "as a function of losing elections," *Whitcomb* v. *Chavis*, 403 U.S. 124, 153 (1971), but as a result of the "built-in bias" (*id.*) of the State's electoral mechanisms. Further, where—as here (423 F. Supp. at 393)—in the past black citizens have been disenfranchised by racially discriminatory state voter regis-

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[3] *Black Voters* v. *McDonough*, 565 F.2d 1 (1st Cir. 1977) (Boston City School Committee).

[4] *Parnell* v. *Rapides Parish Police Jury*, 563 F.2d 180 (5th Cir. 1977) (parish police jury and school board); *Paige* v. *Gray*, 538 F.2d 1108 (5th Cir. 1976) (Albany, Ga., City Council); *Perry* v. *City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) (city council); *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish Police Jury* v. *Marshall*, 424 U.S. 636 (1976) (parish policy jury and school board).

[5] *Seals* v. *Quarterly County Court*, 526 F.2d 216 (6th Cir. 1975) (Madison County, Tenn., county governing board).

[6] *Kendrick* v. *Walder*, 527 F.2d 44 (7th Cir. 1975) (Cairo, Ill., City Commission).

[7] *Dove* v. *Moore*, 539 F.2d 1152 (8th Cir. 1976) (Pine Bluff, Ark., City Council).

tration statutes and mechanisms, the requirement of at-large municipal voting under these conditions unconstitutionally perpetuates the past purposeful and intentional exclusion of blacks from the political and electoral processes of the municipality, cf. *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977), and distinguishes the exclusion of the disenfranchised racial minority from exclusion of other interest groups, cf. *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 156. In addition, where—as the proof here shows (423 F. Supp. at 389-92)—the at-large elected city government has been unresponsive to the needs and interests of the minority community, the presumption that each city commissioner represents and serves all of those who elect him in citywide voting, cf. *Dallas County* v. *Reese*, 421 U.S. 477, 480 (1975), is overcome, and the exclusion of minority representation goes to the heart of the democratic process:

> Racial minorities protest this institutionalized bar to their effective exercise of political power. They point out that, because of racial discrimination, they have been and are being denied adequate educational, employment, and housing opportunities and consequently have common interests in these substantive areas which are unique to them because of their race. In a system dominated by the majority, racial minorities complain, they are powerless to improve their condition because the government in which they lack representation and political influence is unconcerned about their problems. In particular, racial minorities urge that they must be given the opportunity to elect members of their own race who, having experienced similar difficulties, are more understanding of the minority's problems and better able to articulate the minority's viewpoint. Noting that in a ward system they would be thus represented and able to exploit their political power, minorities contend that

> an at-large electoral system which precludes this access is invalid: the inability to elect a share of representatives substantially proportionate to their numbers is alleged to be a denial of the effective representation to which they are entitled under the Constitution.[8]

Third, no meaningful distinction can be drawn between at-large legislative voting and at-large municipal voting. Multi-member legislative districts "in logic of analysis are merely one form of at-large voting . . ." *Zimmer* v. *McKeithen, supra*, 485 F.2d 1315 (Clark, J., dissenting). While certain differences may exist in the evils attributable to at-large legislative elections and at-large municipal voting,[9] they are identical in their one distinguishing feature—both multi-member districts and citywide municipal voting "[allow] the majority to defeat the minority on all fronts," *Kilgarlin* v. *Hill*, 386 U.S. 120, 126 (1967) (Douglas, J., concurring). It is this winner-take-all feature that permits the overrepresentation of the majority and the exclusion of the minority—which might gain representation under single-member districts—under both multi-member legislative districts and at-large municipal voting.

[8] Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353, 360 (1976) (footnotes omitted).

[9] In *Corder* v. *Kirksey*, 585 F.2d 708, 713 n. 11 (5th Cir. 1978), the Fifth Circuit noted that there were certain differences between multi-member legislative districts and local at-large districts. But most of the recognized evils of multi-member legislative districts cited by this Court for preferring single-member districts in court-ordered legislative reapportionment plans are equally applicable to at-large municipal voting. In court-ordered plans, single-member districts are preferred "[b]ecause the practice of mutimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities . . ." *Connor* v. *Finch*, 431 U.S. 407, 415 (1977); see also, *Chapman* v. *Meier*, 420 U.S. 1, 15-19 (1975). All of these disadvantageous characteristics of multi-member legislative districts are shared by at-large municipal voting, and the Court has held that single-member districts are preferred in court-ordered plans in both cases involving multi-member legislative districts and in cases involving at-large county and municipal voting. *Wise* v. *Lipscomb*, 46 U.S.L.W. 4777, 4779 (U.S. June 22, 1978) (No. 77-529); *East Carroll Parish School Bd.* v. *Marshall, supra.*

Indeed, there is a close analogy with malapportioned voting districts, since both at-large voting and malapportioned districts involve claims of dilution of voting power. *Allen* v. *State Board of Elections, supra*, 393 U.S. at 569. The Court has not limited dilution claims involving malapportionment to state legislative districts, but has applied the dilution criteria based upon numerically unequal districts to all "units of local government having general governmental powers over the entire geographic area served by the body," *Avery* v. *Midland County*, 390 U.S. 474, 485 (1968). It would be anomalous indeed for the Court to sustain dilution challenges based on malapportionment of municipal voting districts in the context of municipal voting to allow one kind of dilution challenge—based on malapportioned municipal voting districts—but not to allow another—based on minimizing and cancelling out black voting strength. Certainly nothing can be found in the Fourteenth Amendment—which was enacted specifically to protect racial minorities—which would support such a bizarre distinction.

II. AS OUR EXPERIENCE IN MISSISSIPPI INDICATES, THE FIFTH CIRCUIT'S DECISION IN THIS CASE IS CORRECT AND SHOULD BE AFFIRMED.

The Fifth Circuit correctly decided that an at-large municipal voting system is unconstitutional when it is enacted for a racial purpose, maintained for a racial purpose, or operates to deny the minority community equal access to the electoral process. *Bolden* v. *City of Mobile, Ala.*, 571 F.2d 238 (5th Cir. 1978); see also, *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978). These legal principles represent a proper application of the

holdings in this Court's prior decisions in *Whitcomb* v. *Chavis*, *supra*, and *White* v. *Regester*, *supra*.

The Fifth Circuit's decision in this case addresses a serious and continuing problem of exclusion of minority representation from equal participation in municipal government which exists throughout the South and possibly in some Northern communities as well. In Mississippi, where we are familiar with local conditions because of our extensive voting rights litigation there, at-large municipal voting has been both instituted and maintained for purposes of minimizing and cancelling out black voting strength. In 1962—after the first massive voter registration drives were getting underway—the Mississippi Legislature enacted a statute, Miss. Laws, 1962, ch. 537, requiring all code charter municipalities with a mayor-alderman form of government to switch from ward to at-large, citywide election of aldermen. *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court). Prior to 1962, cities with populations over 10,000 were required to elect six aldermen by ward and one at-large, and cities with populations under 10,000 had an option of electing four aldermen by ward and one at-large, or of electing all five aldermen at-large. An action was filed challenging the constitutionality of this statute. In 1975, on evidence showing that "it was a foreseeable certainty that in many wards in many municipalities the electorate would contain a majority of black citizens" (404 F. Supp. at 213), and that the author of the statute argued during the legislative debates that "this is needed to maintain our southern way of life" (*id.*), a three-judge District Court declared the statute violative of the Fourteenth and Fifteenth Amendments for the reason that it was designed "to forestall the possibility that black aldermen might in some instances win election" and was passed with the "intent to thwart the election of minority candidates

to the office of alderman." *Stewart* v. *Waller*, *supra*, 404 F. Supp. at 214.

As a result of the *Stewart* injunction enjoining enforcement of the 1962 statute, 29 cities which had switched to at-large elections were required to revert to ward elections. In the 1977 municipal elections—the first since the *Stewart* decision—twenty black aldermen were elected for the first time to formerly all-white boards of aldermen in fourteen cities covered by the *Stewart* decree.

Similarly, after the passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973, allowing black citizens to register and vote in large numbers in the South, the Mississippi Legislature enacted several statutes requiring and allowing county boards of supervisors and county boards of education to switch from district to at-large, countywide elections. See United States Commission on Civil Rights, POLITICAL PARTICIPATION 21-23 (1968). In *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 569-70, this Court held that such statutes were covered by the Federal preclearance requirement of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, in part because of their potential for diluting and minimizing minority voting strength. The statutes were submitted to the Attorney General of the United States, and an objection was lodged based upon dilution of black voting strength.

These statutes were enacted purposefully and intentionally to prevent the election of black candidates and to deprive black voters of the opportunity to elect candidates of their choice. But as here when a municipality maintains an at-large, citywide voting scheme for the purpose of diluting black voting strength, the result is the same and the constitutional rights of minority voters are equally violated. In Mississippi, the Lawyers' Com-

mittee has represented black voters in filing at-large municipal voting challenges against ten Mississippi cities, involving the cities of Aberdeen, Columbus, Greenville, Greenwood, Hattiesburg, Hazlehurst, Jackson, Picayune, West Point, and Yazoo City. In each instance, all members of the city council were elected in at-large, citywide voting, and despite the fact black candidates had run for the city council, and blacks constituted more than 20% of the voting population (but less than a registered majority), in only one instance[10] had any black candidate been elected to the city council when the suit was filed. These municipalities—and others—are not covered by the injunction issued in *Stewart* v. *Waller*, *supra*, either because they have commission forms of government or because they are private charter municipalities in which their at-large voting systems are not mandated by state statute. Like Mobile, some of these municipalities instituted at-large voting systems in the early 1900's; others are of more recent vintage. But in each case, the maintenance of at-large municipal voting has resulted in the almost total exclusion of any black representation in city government, although black persons constitute 20% or more of the city population.[11] To the best of our knowledge, of the more than 1,300 elected city council members in Mississippi, only seven

[10] In 1974 Mrs. Sarah Johnson was elected to the six-person Greenville City Council with less than a majority of the vote in a three-person race. After these suits were filed, two black council members were elected in at-large voting in Greenville (Mrs. Johnson was reelected) and Picayune.

[11] Because of *White* v. *Regester* and other related Fifth Circuit decisions, six of the ten cases have been settled and single-member ward districting plans have been substituted for all at-large elections. In each case, the new ward plans provide for two majority black wards. In two cases, ward election plans went into effect for the 1977 and 1978 municipal elections in West Point and Yazoo City; in West Point one black alderman was elected to the previously all-white board of aldermen and in Yazoo City two black aldermen were elected for the first time.

black city council members have been elected in at-large voting from white majority constituencies or in ward voting from white majority wards.

Under circumstances such as these, public officials in the South can hardly claim to be unaware that the maintenance of at-large municipal voting schemes, particularly in face of a recent past history of exclusion of black citizens from the political process through disenfranchisement, operates to dilute, minimize, and cancel out black voting strength and to exclude the possibility of black representation in municipal government, whatever the particular form that municipal government may take.

In the circumstances of this case, the constitutional claims of black voters and the findings of the District Court that at-large municipal elections have been maintained for a racially discriminatory purpose and have operated to exclude black representation should outweigh the purely administrative claims of the city that a citywide perspective is needed in city government. In *Connor* v. *Finch*, *supra*, the Mississippi Legislative reapportionment case, the State official defendants made similar claims that at-large voting in multi-member legislative districts were needed to maintain a countywide perspective in the Legislature, but these arguments were rejected by the Court last Term in rejecting pleas for multi-member districts in a court-ordered plan, *Connor* v. *Finch*, *supra*, 431 U.S. at 415. Many Mississippi municipalities have been forced to abolish at-large voting and revert to ward elections, but no claim has been made that this has destroyed or seriously impaired the orderly functioning of municipal government.

III. PLAINTIFFS CHALLENGING AT-LARGE MUNICIPAL VOTING FOR DILUTION OF BLACK VOTING STRENGTH SHOULD NOT BE REQUIRED TO PROVE THAT THE AT-LARGE SYSTEM WAS ADOPTED FOR A SPECIFIC RACIAL PURPOSE IF THE PROOF SHOWS THAT AT-LARGE MUNICIPAL VOTING HAS BEEN MAINTAINED TO EXCLUDE BLACK REPRESENTATION OR OPERATES, IN THE FACE OF A PAST HISTORY OF EXCLUSION OF MINORITIES FROM THE POLITICAL PROCESS, TO DENY BLACK VOTERS THE OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE.

In *White* v. *Regester*, *supra*, a unanimous Court held that at-large legislative voting in multi-member districts is unconstitutional if plaintiffs produce evidence (412 U.S. at 766)

> that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis*, *supra*, at 149-50.

In neither *Whitcomb* nor *White* did the Court establish a specific requirement that plaintiffs must prove that the at-large system had been instituted for a racially discriminatory purpose, if the proof showed that at-large voting had operated to deny minority citizens an equal opportunity to participate in the political and electoral processes. Therefore, there seems to be no way for this Court to reverse the decision of the Fifth Circuit in this case without overruling this Court's unanimous decision in *White*.

In cases such as this, where the at-large voting scheme was adopted with the commission form of government in

1911, a requirement that plaintiffs prove specific racial intent with the adoption of at-large elections would place an impossible burden on minority plaintiffs. Virtually no witnesses to the change would be alive today, and newspaper accounts may be nonexistent or unreliable.

Nor do this Court's subsequent decisions governing the Fourteenth Amendment racial purpose requirement require such a burden. Thus, in *Washington* v. *Davis*, 426 U.S. 229, 241-42 (1976), this Court was careful to say:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo.* v. *Hopkins*, 118 US 356 (1886). It is clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." *Akins* v. *Texas*, *supra*, at 404. *Smith* v. *Texas*, 311 US 128 (1940); *Pierre* v. *Louisiana*, 306 US 354 (1939); *Neal* v. *Delaware*, 103 US 370 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, *Hill* v. *Texas*, 316 US 400 (1942), or with racial nonneutral selection procedures, *Alexander* v. *Louisiana*, 405 US 625 (1972); *Avery* v. *Georgia*, 345 US 559 (1953); *Whitus* v. *Georgia*, 385 US 545 (1967).
>
> * * * *
>
> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the

> law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total of seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

In looking at the scheme at issue here, both the District Court, after "an intensely local appraisal of [its] design and impact", *White* v. *Regester*, *supra*, 412 U.S. at 769, and the Court of Appeals were convinced that the evidence clearly demonstrated that at-large voting in Mobile had been maintained for a racial discriminatory purpose. It has operated for almost 70 years to exclude black representation totally from Mobile's governing body, and certainly the City Fathers could not be ignorant of this preeminent fact. As Mr. Justice Stevens wrote in his concurring opinion in *Washington* v. *Davis*, *supra*, 426 U.S. at 253:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.

A requirement that plaintiffs must prove intentional discrimination with the enactment of at-large voting schemes also overlooks the firmly established principle of constitutional law that a statute or official action may be constitutional at the time it was adopted, but may become unconstitutional over time as conditions change. "A statute valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. Louis R. Co.* v. *Walters*, 294 U.S. 405, 415 (1935). Thus, in the reapportionment cases, a legislative reapportionment plan which provided equi-populous and perfectly valid districts when adopted may become unconstitutional over time as a result of legislative inaction in not responding to shifts of population which render the legislative districts malapportioned. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186, 192-93 (1962).

Thus, in this case, even if the at-large voting scheme was adopted in 1911 in a "race-proof" circumstance in which there was no racial intent because Mobile blacks were denied the right to vote, nevertheless the at-large scheme became unconstitutional through legislative inaction as blacks were later permitted to register and vote and the city commission recognized that at-large elections operated completely to deny black voters of Mobile the opportunity to elect city council members of their choice and to exclude black representation on the Mobile city commission.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

NORMAN REDLICH
Trustee

FRANK R. PARKER
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
720 Milner Building
210 South Lamar Street
Jackson, Mississippi 39201
(601) 948-5400

ROBERT A. MURPHY
Staff Attorney
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1978

CITY OF MOBILE, ALABAMA, ET AL., APPELLANTS

v.

WILEY L. BOLDEN, ET AL.

ROBERT R. WILLIAMS, ET AL., APPELLANTS

v.

LEILA G. BROWN, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
DENNIS J. DIMSEY
MIRIAM R. EISENSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530

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ROBERT R. WILLIAMS, ET AL., APPELLANTS

v.

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ON APPEALS FROM THE
UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the at-large systems of electing the Mobile, Alabama, City Commission and the Mobile

County Board of School Commissioners impermissibly dilute black voting strength in violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether these at-large systems deny or abridge the rights of black voters in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

3. Whether the district court's orders granting single-member district relief were within the scope of its remedial discretion in the circumstances of these cases.

INTEREST OF THE UNITED STATES

Congress has given the Attorney General important responsibilities to protect the voting rights of Americans. Under 42 U.S.C. 1971 and 1973j, the United States may institute actions to prevent the denial of the right to vote on grounds of race or color. The United States has brought a number of actions against local governing bodies alleging that particular at-large electoral schemes unlawfully dilute the voting strength of blacks or other minority groups, and has participated as amicus curiae in other voting dilution cases, including the litigation in the court of appeals in No. 77-1844. The Court's decision in the two cases here, which concern at-large schemes found by the courts below to have abridged the voting rights of black voters in the City and in the County of Mobile, Alabama, could affect future efforts by the

United States to seek judicial relief for minority groups in other communities whose voting rights are similarly abridged. The interest of the United States in No. 77-1844 is enhanced by an objection, interposed by the Attorney General in 1976 pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to special state legislation changing the City of Mobile's elections from three undifferentiated City Commission "places" to at-large elections for three commissioners identified by function.

STATEMENT

These are class actions brought in June 1975 by black citizens alleging that at-large systems for electing the members of certain local governing bodies have operated to dilute the voting strength of blacks in violation of, *inter alia*, the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965, 42 U.S.C. 1973.[1] In No. 77-1844 ("*Bolden*"),

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[1] Plaintiffs in both cases also made claims predicated on the First and Thirteenth Amendments and on 42 U.S.C. 1983 and 42 U.S.C. 1985(3). In each case the district court dismissed the 1985(3) claim as to all defendants and in No. 77-1844 the court dismissed the 1983 claim as to the City of Mobile (Bolden A. 26-27; Brown A. 83a). The dismissal of the 1983 claim against the city was granted before this Court's decision in *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), overruling the holding of *Monroe* v. *Pape*, 365 U.S. 167 (1961), that municipal governments are immune from suit under that provision.

a class ultimately certified as "all black persons who are now citizens of the City of Mobile, Alabama" (Bolden A. 35-36) sued the city and its three incumbent city commissioners, challenging the at-large system of electing the commissioners, who perform both executive and legislative functions and who are elected by majority vote to numbered places with designated functions. In No. 78-357 ("*Brown*"), a class later certified as all black citizens of Mobile County (Brown J.S. App. 3b) sued, *inter alia*, the county and its five-member Board of School Commissioners, challenging the at-large system by which those commissioners were elected.[2] Both cases were decided by the district court in favor of the plaintiffs after full trials on the merits.[3]

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[2] The suit also named as defendants the Mobile County Commission and certain county officials, and challenged the at-large system for electing the county commissioners (Brown A. 75a-79a). Plaintiffs prevailed on that claim, but those defendants took no appeal, so that portion of the suit is no longer at issue.

[3] The essential facts in both cases are either undisputed or may be so regarded now, because in each case the court of appeals affirmed the findings of the district court (Bolden J.S. App. 12a; Brown J.S. App. 2a), and this Court does not ordinarily " 'undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' " *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967), quoting *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). Much of the evidence presented in *Bolden* was presented in *Brown* as well. See Brown J.S. App. 2b-3b n.1. When referring to testimony or exhibits common to both cases, we will cite only to the *Bolden* record.

A. The Statutory Bases For At-Large Voting

1. *City Commission*

In Alabama, the form of government each city must or may adopt is prescribed by state law. The form available to cities not covered by some other local act or general act of local application is set forth in Title 37 of the Code of Alabama of 1940, now Chapter 11-43 of the 1975 Code, which provides for a "weak mayor-council" system. In Act 281 of 1911,[4] in addition to the forms of municipal government already provided for elsewhere, the state legislature authorized all cities and towns, not under compulsory legislation to do otherwise, to adopt a commission form of government. General Laws of Alabama of 1911, page 330.

As originally passed, this act provided for three commissioners elected at-large to staggered three-year terms. In each election, the voters would designate a first and a second choice, and the winner would be the candidate receiving a majority of first-choice votes or, if there was none, the candidate receiving the majority of first- and second-choice votes. After each election, the commissioners were to choose one of their number as mayor, and divide other administrative responsibilities among the three of them. Act 281, *supra*, Sections 4, 5, 6, 7, 10, and 11. The commissioners were to exercise jointly all legislative and executive power theretofore enjoyed by the mayor,

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[4] Portions of Act 281 are set forth in Bolden J.S. App. 1f-14f.

council, and all independently elected boards and commissions (*id.*, Section 6). Neither this Act nor any later amendment imposed any residency requirement other than residence in Mobile. Elections have, from the beginning, been nonpartisan (Bolden J.S. App. 5b, 6b).

In 1939, the act was amended to provide that the commissioners would serve concurrent four-year terms. Candidates would be required to run either for mayor or for associate commissioner. The two associate commissioners would be elected in a purely at-large vote, the winners being the two receiving the highest numbers of all votes cast. Single-shot voting for associate commissioners was not explicitly prohibited. Ala. Code title 37, Sections 92 and 94.[5] After the election, each commissioner would be assigned a specific set of functions for the duration of his term, as enumerated by the act (*id.*, Section 95).

In 1945, the act was again amended, this time to provide for numbered posts to which candidates, running at large, had to be elected by majorities. Act 295, General Acts of Alabama of 1945, page 490, Section 1.[6] After election, the commissioners were required to designate one of their number as mayor, but no provision was made for assigning specific duties among the three. The act permitted administrative powers to be exercised corporately or, by informal agreement, individually.

Finally, in 1965, the legislature enacted Act 823, General Acts of Alabama of 1965, page 1539.[7] Section 2 of this act designates specific administrative tasks to be performed by each commissioner filling places 1, 2, or 3, and provides that the role of "mayor" (largely ceremonial) be rotated among the three commissioners.[8] After the instant lawsuit was commenced, the City of Mobile submitted Act 823 to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. On March 2, 1976, the Attorney General interposed an objection to the change on the ground that it tends to lock in the use of at-large elections (Bolden R. 478-481).[9] The objection stated (*id.* at 479):

> [I]ncorporating as it does the numbered post and majority vote features, and in view of the

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[5] "Single-shot voting" is the practice of voting for fewer candidates than the number of offices to be filled. It permits a minority group to concentrate its votes on a few candidates and thereby reduce the power of the majority group vote if the latter is distributed among a larger number of candidates. Prohibition of single-shot voting may be achieved by declaring void any ballot that fails to indicate preferences for all positions. R. Dixon, *Democratic Representation; Reapportionment in Law and Politics* 515 (1968).

[6] The 1939 amending act, which was to be in full effect in Mobile in 1945, was held unconstitutional under the Alabama Constitution, on a procedural ground, in *Baumhauer* v. *State*, 240 Ala. 10, 198 So. 272 (1940).

[7] Portions of Act 823 are set forth at Bolden J.S. App. 1g-3g.

[8] The functions are: (1) finance and administration; (2) public safety; and (3) public works and services.

[9] "Bolden R." refers to the *Bolden* record, other than transcripts and exhibits, filed in the court of appeals.

> history of racial discrimination, and evidence of bloc voting in Mobile, we are unable to conclude * * * that section 2 of the Act No. 823 will not have the effect of denying or abridging the right to vote on account of race or color.

The objection letter noted that the move to functional posts would make it impossible for the city to change to single-member district voting, since it would be inappropriate to give one segment of the city exclusive right to elect, for example, the Commissioner of Public Works (Bolden R. 479). No suit has been brought in the District Court for the District of Columbia to seek clearance under Section 5.[10]

Mobile's adoption of the commission form of government took place in 1911, in a context that the district court labeled "race-proof" because the Alabama Constitution of 1901 had already succeeded in disfranchising blacks (Bolden J.S. App. 20b, 28b-29b). Plaintiffs' historical expert, Dr. Melton A. McLaurin, testified that blacks had been active in Alabama politics during the Reconstruction Era, and that Mobile had been a center of black political ac-

[10] Joseph Langan, a long-term member of the Mobile City Commission and strongly identified with black interests, testified at trial that he had introduced the 1939 amendment discussed above when he was a member of the Mobile delegation to the state legislature, and later was responsible for recommending the 1965 change to predesignation of the tasks of the commissioners (Bolden Tr. 328-331). Defendants' expert, Dr. James E. Voyles, testified that a fixed designation of duties was desirable since it prevents two of the commissioners from combining to reduce the authority of the third (*id.* at 1151).

tivity. The movement to disfranchise blacks at the turn of the century was led by the same reformers who advocated the commission form of government to reduce corruption—corruption being heavily identified with manipulation of the black vote. While race per se was not the motivating force behind the commission reform, Dr. McLaurin testified, those who supported it were aware of the impact at-large elections would have upon the blacks should they ever again regain the vote. Blacks took no part in the legislature that authorized adoption of the commission system or the referendum adopting it in Mobile (Bolden A. 40-51).

2. *Board of School Commissioners*

The Mobile County school system, the first public school system in Alabama, was established in 1826. The system was originally governed by a board of 13-25 commissioners who served five-year terms. See 1825-1826 Ala. Acts, pages 35-36. There is some question whether these commissioners were elected at-large or appointed by the state legislature. Compare Brown J.S. App. 19b with *Board of School Commissioners* v. *Hahn*, 246 Ala. 662, 663, 22 So.2d 91, 92 (1945). In any event, an 1836 Alabama law specified that the school commissioners would be elected at-large, and it set their number at 13. See 1836 Ala. Acts, page 48.

In 1854, the state legislature passed an act creating a public school system for the rest of the State of Alabama. With minor exceptions, this act preserved the independent status of the Mobile County

school system. See 1853-1854 Ala. Acts, page 8. This special independent status of the Mobile County system was subsequently incorporated into the Alabama Constitution. See Section 1 of Article XIII of the Alabama Constitution of 1875; Section 270 of Article XIV of the Alabama Constitution of 1901. In 1876, the Alabama legislature reduced the number of school commissioners from 13 to 9, and required at least two of them to live within six miles of the county courthouse. The commissioners continued to be elected at-large. See 1875-1876 Ala. Acts, pages 363-364.

The current composition and operation of the Mobile County school system are apparently governed by legislation passed in 1919.[11] See 1919 Ala. Local Acts, page 73.[12] At that time blacks were totally disfranchised by operation of provisions of the Alabama Constitution of 1901. The 1919 Act establishes a board of five members, to be elected at-large[13] in

[11] The district court found it unnecessary to resolve a dispute between the parties as to whether the present system was established by this 1919 local act, or, as plaintiffs contended, by a general act passed in 1939 (Brown J.S. App. 7b-8b, 27b).

[12] The act is set forth at pages 71-74 of appellants' brief in No. 78-357.

[13] Members of other county school boards in Alabama are also elected at-large. Ala. Code Section 16-8-1 (1975), which governs the composition and election of county school boards other than Mobile's, provides that "[t]he county board of education shall be composed of five members, who shall be elected by the qualified electors of the county."

even-numbered years for six-year, staggered terms. There is no district residency requirement. Elections are partisan, and there is a majority vote requirement for the primary, but not for the general elections (Brown J.S. App. 21b-22b).

B. The Black Vote in Mobile Politics: City and County

The long history of racial discrimination with respect to voting in Alabama from 1901 to 1965 is set forth in the cases in which some of those barriers to political rights were struck down. See, *e.g.*, *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three-judge court), aff'd per curiam 336 U.S. 933 (1949) (striking down the Boswell Amendment, which introduced an "interpretation test" on the heels of *Smith* v. *Allwright*, 321 U.S. 649 (1944), which invalidated a "white primary"); *United States* v. *State of Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court) (poll tax). In 1946, there were 275 registered blacks and 19,000 registered whites in the County of Mobile (Bolden A. 51; Bolden Tr. 29). In 1965, when the Voting Rights Act was passed, at least ten Alabama counties were under injunction as a result of earlier suits by the Attorney General attacking discriminatory registration procedures.[14]

Since passage of that Act, blacks in Mobile County have been able to register, vote, and become candi-

[14] See *Sims* v. *Baggett*, 247 F. Supp. 96, 108 n.24 (M.D. Ala. 1965) (three-judge court). Mobile was not one of the counties under injunction, and federal registrars were not sent to Mobile pursuant to the 1965 Act (Bolden J.S. App. 21b n.8).

dates (Bolden J.S. App. 7b). Blacks constitute approximately one-third of both the city population of more than 190,000 and the county population of approximately 337,000.[15] They are heavily concentrated in the City of Mobile and the City of Prichard (Brown J.S. App. 6b). Because of housing patterns in the City of Mobile, it would be impossible to divide in into three compact, contiguous zones of equal population without creating at least one predominantly black district (Bolden J.S. App. 4b-5b).

It is undisputed that no black person has ever been elected either to the Mobile City Commission or the Mobile County Board of School Commissioners and that, with one exception discussed below, no black or candidate identified with blacks has ever won an at-large election for any office in or for the city or county.

Extensive evidence was introduced to show the degree to which voting in Mobile was polarized along racial lines. Plaintiffs in both cases made use of correlation analyses done by defendants' expert, Dr. James E. Voyles, in his doctoral dissertation,[16] and

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[15] The estimate for the city is derived from 1970 census figures showing blacks to constitute 35.4% of a population of 190,026 (Bolden J.S. App. 4b). The county estimate is based on 1976 figures showing blacks to constitute 32.5% of a population of 337,200 (Brown J.S. App. 6b).

[16] "An Analysis of Mobile Voting Patterns, 1948-1970" (Bolden and Brown Pltf. Ex. 9). Excerpts from Dr. Voyles' dissertation are set forth at Bolden A. 575-590 and Brown A. 459a-503a.

correlation studies by their own expert, Dr. Cort B. Schlichting.[17]

The career of Joseph Langan, a long-term member of the Mobile City Commission and a white man long identified with black interests, furnished the most significant data with respect to city commission elections, for no blacks ran for a commission place until 1973, and then only as minor candidates (see *infra* at page 16). Langan ran for city commissioner and won in 1953 and thereafter, every four years, until he was defeated in 1969 (Bolden A. 104). According to Dr. Voyles' tables and analyses, Langan began as a New Deal Democrat who won, at first, with a coalition of the white vote and such black vote as then existed (Bolden Pltf. Ex. 9 (Voyles' dissertation) at 82-86 and table on 87). Beginning in 1961, racial polarization developed between the lower and lower-middle class black wards on the one hand and the corresponding white wards on the other, the

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[17] Bolden Tr. 92-194 and Bolden Pltf. Exs. 10-53. The basic scheme of these correlation analyses is as follows: if there are two wards, one 100% black and the other 100% white, and 100% of the vote in each goes to opposite candidates, the correlation between race and voting would be 1.0 and race would account for 100% of the voting behavior. No candidate ever produces a perfect correlation, of course, if for no other reason than that no ward is 100% black or white. Any city- or county-wide correlation of .7 or greater indicates that race accounts for at least 49% of the voting behavior (Bolden Tr. 151-153). This is calculated by an accepted mathematical formula whereby the correlation, known as "Pearsons R," is squared to produce the percentage accounted for by race (R^2) (Bolden Tr. 192-193; Brown A. 472a-473a).

blacks voting as a virtual bloc for Langan, but the lower and lower-middle class whites moving away from him (Pltf. Ex. 9 at 91-93).[18] The gap widened with each successive election (*id.* at 93-99), so that in 1969, by which time the black vote had greatly increased, Langan won 94.39% of the vote in the lower-middle class black wards but only 34.35% in the lower-middle class white wards, with an overall correlation of .91 (table at 99; Bolden A. 591). Campaign literature openly identified Langan with the so-called "bloc vote" and with John LeFlore, a well-known black leader in Mobile (Bolden Pltf. Ex. 61, Nos. 48, 49, 55, 56, 58, and 59). One flyer, warning "Bloc Vote or You?", listed the black wards that had voted for Langan in the past and described five ways in which the "bloc vote" is obtained, including such actions as favoring integration and open housing, and using terms of respect when addressing blacks (Bolden Pltf. Ex. 61, No. 56).

At trial, the witnesses disagreed concerning the reason for Langan's ultimate defeat in the 1969 run-off. There had been a partial black boycott of the elections that year instigated by radical leaders. Langan himself attributed the defeat to racial polarization, to his long incumbency, and to the generally low turnout resulting from Hurricane Camille and the black boycott (Bolden A. 109-113). No one, however, disputed that the 1969 run-off election between Langan and Joseph Bailey was the high-water mark of polarization.[19]

[18] Langan won 94.31% of the vote in the lower class and 91.30% in the lower-middle class black wards; the overall correlation with race was .71 (Bolden Pltf. Ex. 53 and Bolden Deft. Ex. 25).

During the same period, roughly 1962-1972, three blacks and one white who was highly identified with black interests ran at-large for the Mobile County Board of School Commissioners. Each of them lost in a Democratic primary run-off to a white (or, in the case of Gerre Koffler, herself a white, to a segregationist) candidate. Each of these elections was significantly polarized by race (Bolden A. 131-138, 160-161; Bolden Pltf. Exs. 10, 19, 34, 36, 53).[20] Similarly, in 1969, in a special at-large election held to fill state legislature seats, Clarence Montgomery and T.C. Bell, black candidates, lost in highly polarized voting (Bolden A. 579-580, 591). Legislature races, unlike those for the city commission, are partisan. In this race, the white Republicans and Democrats agreed not to field more than one candidate against either black so that a white would be sure to win each contest (*id.* at 579-580). In 1972, Langan entered the race for the Mobile County Commission and lost in a severely polarized run-off. As in his 1969 Mo-

[19] Voyles also testified that in the three city commission races that year those who prevailed won *no* black wards and that Langan carried no group of wards (*e.g.*, lower or middle class) that was majority white, and very few white wards at all (Bolden A. 156, 159-161, 165, 169).

[20] This was particularly so in 1966, when the index of correlations for black candidate Russell was more than .90 (Bolden Tr. 163).

bile City Commission contest, Langan was the victim of explicitly racial campaign propaganda linking him to the "bloc vote" (Bolden Pltf. Exs. 43, 53, and 61, Nos. 10, 14, and 16; Bolden Tr. 310-326).

Dr. Voyles hypothesized at trial that although racial polarization reached a peak in 1969, it was tapering off in the 1970's and would soon cease to be a factor in Mobile elections (Bolden A. 500-523). This hypothesis was premised largely upon the 1973 city commission races in which black candidates ran, but blacks voted for white candidates (*id.* at 500-502). The evidence showed, however, that in the 1973 city commission race, three blacks ran, two of them for place 3 and one for place 1. None was particularly well known in the black community, and they ran limited, under-financed compaigns. None reached the run-off stage, and each received his or her only votes in the black wards (Bolden A. 89-90, 591; Bolden Tr. 237-238, 1194-1196; Bolden Pltf. Exs. 47, 48, 49 and 99 at 15). As among the remaining white candidates, race was not a factor, for none was highly identified with black interests; but the pattern of 1969 repeated itself to the extent that the candidate receiving the majority of the black vote lost the election.[21]

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[21] Commissioner Doyle had run unopposed for place 2. Commissioner Mims (place 3) won without a run-off, beating three white and two black opponents, but carrying very few black wards (Bolden Pltf. Exs. 47, 49; Bolden Deft. Ex. 28; Bolden A. 591). In the race for place 1, after Taylor (black) and Bridges (a minor white candidate) dropped out, incumbent Bailey faced a run-off with challenger Gary Greenough. Both claimed to have sought the black vote. In the run-off, the black vote split, and Bailey lost despite the fact that he received approximately 59% of the black vote (Bolden A. 184, 396-399; Bolden Tr. 1120-1136; Bolden Pltf. Ex. 46; Bolden Deft. Ex. 29).

Plaintiffs offered evidence of two elections after 1973 to show that race continued to be a significant factor in Mobile politics. In 1974, Lonia Gill, a black, ran against a white, Dan Alexander, for the Board of School Commissioners (Bolden Pltf. Ex. 52; Bolden A. 591). Gill was not regarded as a radical candidate (Bolden Pltf. Ex. 61, No. 2). Like the earlier school board candidates, she was well regarded and reasonably well financed (Bolden Tr. 238-239). Although Alexander did not lead in the first primary, he won by a wide margin in the run-off in a highly polarized vote (Bolden Tr. 361-362). James Buskey, a black, testified that he ran for State Senate District 33 in 1974, the first year of single-member legislative districts, and lost in a close, polarized run-off to a white opponent. The campaign featured racially oriented tactics (Bolden A. 93-94).

Many witnesses, both black and white, testified that they believed it would be futile for a black to attempt to run at-large (see, *e.g.*, Bolden A. 127-129, 206-208). Witnesses experienced in local politics, moreover, indicated that, while endorsement by the Non-Partisan Voters League, a local black political association, could be helpful to a candidate, too-conspicuous black support has been and will continue to be a "kiss of death" (Bolden A. 77-80, 95, 157-159, 198-199, 585; Bolden Tr. 227-230, 253; Bolden

Pltf. Ex. 98 at 10, 15-17; Bolden Pltf. Ex. 100 at 8-10, 20).

C. Responsiveness of Elected Commissioners to the Particularized Needs of Blacks

Both the Mobile City Commission and the Mobile County Board of School Commissioners have been unresponsive to the particularized needs and interests of the black community. Desegregation of such facilities as transportation, the golf course, and the airport have all been achieved by federal court orders, and a federal suit was required to end racial discrimination by the police department (Bolden J.S. App. 12b). The city had segregated fire departments until the late 1960's, and at the time of trial, Fire Chief Edwards was unsure how many blacks were employed by the department; Creoles and blacks together accounted for 27 persons of 439 (Bolden Tr. 1403-1405). There was, at that time, no program for recruiting black firemen comparable to the affirmative action plan ordered by the federal court for the police department (Bolden A. 277-279, 300). The city's EEO-4 reports to the federal government show that blacks represent about 26% of the city's workforce, but they are heavily concentrated in the lowest service and maintenance job categories (*id.* at 611). Discrimination in city employment is a matter that the Non-Partisan Voters League has frequently called to the attention of the city commission (Bolden Tr. 400-401; Bolden Pltf. Ex. 69). The three circumbent commissioners testified at trial that they saw no need for local anti-discrimination ordinances (Bolden A. 301-302, 480, 498-499).

Blacks have minimal representation on the many boards and committees appointed by the city commissioners to help run the city by licensing skilled tradesmen, floating bonds, redeveloping blighted areas, and fostering the city's cultural life. Blacks accounted, at the time of trial, for about 10% of the total membership on these boards (Bolden J.S. App. 12b; Bolden A. 601-604). Participation on many of these boards requires certain technical expertise or skills. Commissioner Mims testified, however, that the commission sometimes limits the field from which such appointments are made to candidates recommended by voluntary organizations and associations, composed mostly of whites, even when not required to do so by statute or ordinance (Bolden A. 401-405). In most instances, he was unable to offer explanations for the absence of blacks from the boards (*id.* at 401-451). In one instance, that of a now-defunct citizens advisory committee on the Donald Street Freeway, Mims testified that the large black representation was probably accounted for by federal regulations applicable to federally assisted highway programs (*id.* at 407-408). The five-member Housing Board, most of whose clients are black, had one black member (*id.* at 429-434, 602). Mims testified that he thought blacks were adequately represented by the whites (*id.* at 435).

In the spring of 1976, two major racial incidents occurred. One was a "mock lynching" of a black burglary suspect, carried out by a group of policemen; the second was an outbreak of cross-burnings.

The speed and vigor with which the city commission reacted to these was a matter of debate at trial (Bolden Tr. 251-253, 398; Bolden A. 263-289), but the district court concluded that the city's reaction was "timid and slow" (Bolden J.S. App. 18b). At trial, Public Works Commissioner Mims testified that while he deplored cross-burnings, he thought people could do what they pleased on their own property, and he would endorse an ordinance prohibiting the burning of anything, whether crosses or trash, on public property (Bolden A. 480-481). Police Commissioner Doyle testified that while he, too, deplored cross-burnings, he also deplored murder, rape, and robbery, but felt no compulsion to make public statements about any of these acts (Bolden Tr. 767-768; Bolden A. 297-303). The district court concluded (Bolden J.S. App. 18b):

> The lack of reassurances by the city commission to the black citizens and to the concerned white citizens about the alleged "mock" lynching and cross burnings indicates the pervasiveness of the fear of white backlash at the polls and evidences a failure by elected officials to take positive, vigorous, affirmative action in matters which are of such vital concern to the black people.

Black neighborhoods in Mobile have a disproportionate share of the city's substandard housing, and federal requirements governing the use of federal urban renewal funds have been a major factor in such improvements as have been made (Bolden A. 546-555). The city has made some efforts to resurface streets and deal with drainage problems in black neighborhoods, but inequities remain in comparison with white neighborhoods (Bolden J.S. App. 14b-16b; Bolden A. 354-361, 526-539). In 1973 the local NAACP complained to the United States Department of the Treasury that federal revenue sharing funds were being allocated in a discriminatory fashion (Bolden Pltf. Ex. 111 "D"). The Office of Revenue Sharing (ORS) investigated and reached the conclusion that there were a number of inequities in the use of funds affecting, among other things, resurfacing and drainage. After considerable negotiation, ORS was satisfied that Mobile had made a commitment to rectifying the inequities (Bolden J.S. App. 15b; Bolden Pltf. Ex. 111 "X"; Bolden A. 544). On the basis of all the evidence presented, the district court found that the city's response to the critical needs of the black neighborhoods tends to be "sluggish" (Bolden J.S. App. 17b).

Plaintiffs in the *Brown* litigation did not attempt to establish the unresponsiveness of the Board of School Commissioners by testimonial or documentary evidence. Rather, they requested the trial court to take judicial notice of an ongoing school desegregation suit on its own docket, *Davis* v. *Board of School Commissioners of Mobile County*, C.A. No. 3003-63-H (S.D. Ala.). This desegregation suit against the school board has been in continuous litigation since its filing in 1963. It governs all aspects of the desegregation process within the Mobile County school

system. The district court took judicial notice of the fact that plaintiffs in the *Davis* litigation established that the school board was maintaining a racially segregated system, assigning teachers according to race, and failing to comply with a faculty hiring ratio ordered by the court (Brown J.S. App. 13b-18b).

D. Amenability of the Systems to Change by Political Processes

The commission system can be abandoned by any city by initiative and referendum (Ala. Code, Section 11-44-105 (1975)), but, absent special legislation, a Mobile referendum would result either in reversion to the aldermanic system that governed the city prior to adoption of the commission system or conversion to the weak mayor-council system authorized by general law. A referendum held in 1963 pursuant to that section failed to pass (Bolden Tr. 334; Bolden Pltf. Ex. 98, at 68). In 1965, the legislature, in Chapter 3 of Act 823 (see pages 7-8, *supra*), authorized Mobile, by initiative and referendum, to adopt a weak mayor-council scheme calling for the election of seven members at-large to numbered places for four-year terms. Robert Edington, a former state senator, stated in his deposition that it was not possible to put single-member districts into the 1964-1965 bill because it would then have been regarded as a bill to put blacks into city offices (Bolden Pltf. Ex. 98, at 40-43). A referendum in 1973 based upon Act 823 also failed to pass (Bolden A. 256; Bolden Tr. 337).

As a practical matter, the power to pass or veto bills modifying the form of city government resides in the city's delegation to the state legislature. Voters in the City of Mobile help to elect three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. A majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous endorsement of a bill of local application by the affected locality's delegation virtually insures passage (Bolden J.S. App. 29b-30b; Brown J.S. App. 35b; Brown Tr. 535-536; Bolden Tr. 742-743).

After the *Bolden* suit was filed, a bill was introduced in the State Senate to make a strong mayor-council system an option the City of Mobile could adopt by referendum. It would provide for a mayor, to be elected at-large, seven council members from single-member districts, and two council members to be elected at-large. State Senator Bill Roberts, the bill's sponsor, testified that his bill was being held up by the "veto" of one senator (Bolden A. 248-258).

Similar bills have been introduced calling for single-member district elections for the Mobile County Commission and the Mobile County Board of School Commissioners, but none has ultimately succeeded in changing the at-large systems. The 1975 legislature failed to pass the bill sponsored by Representative Cain Kennedy, a black legislator from Mobile County, that called for the election of the Mobile County Commissioners from single-member districts (Brown A. 234a, 237a-238a). The 1975 legislature did pass

a bill, also sponsored by Representative Kennedy, calling for the election of the Mobile County Board of School Commissioners from single-member districts (1975 Ala. Acts, Reg. Sess., No. 1150). This bill, passed shortly after the filing of the *Brown* litigation, was, however, struck down in a suit filed by the school commissioners, on the ground that it had been improperly published. *Board of School Commissioners* v. *Moore*, C.A. No. 96204 (Mobile County Cir. Ct., Feb. 17, 1976) (Brown J.S. App. 23b; Brown A. 234a).[22]

In the 1976 legislature, a second single-member district bill (the "Sonnier bill") was introduced at the request of the Board of School Commissioners; but it did not pass because of objections by black legislators who discovered infirmities that would make it vulnerable to legal challenges if it were enacted (Brown J.S. App. 22b-26b; Brown A. 169a-170a, 238a-239a). The defendant school commissioners in *Brown* sought a dismissal from the *Brown* litigation, or in the alternative a severance or a continuance, on the ground that the Sonnier bill would provide a political remedy for the plaintiffs' alleged injuries respecting school commissioner elections (Brown J.S.

[22] The school commissioners had secured their dismissal as defendants in *Brown* on the grounds that the 1975 act would give plaintiffs the relief they were seeking with respect to the Board (Brown J.S. App. 23b). The school commissioners were rejoined as defendants after they succeeded in invalidating the act on which they had thus relied (*ibid.*).

App. 24b-25b; Brown A. 166a-181a). The district court denied the motions and later, in post-trial submissions, the defendant school commissioners conceded that the Sonnier bill was not a valid redistricting measure (Brown J.S. App. 25b-26b, 57b-58b).[23]

Regardless of its form or which political entity in the City or County of Mobile is concerned, whenever a districting bill is proposed by any member of the Mobile County delegation to the State Senate or House of Representatives, questions are raised concerning how many blacks, if any, might be elected (Bolden J.S. App. 30b; Brown J.S. App. 35b; Brown A. 234a, 268a-269a, 309a-310a; Bolden Pltf. Ex. 98, at 40-43).

E. The District Court's Decisions and Orders

1. In each case, the district court assessed all the evidence introduced at trial in light of the tests for racially based vote dilution set out in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *White* v. *Regester*, 412 U.S. 755 (1973), and *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976).[24]

[23] The bill was introduced as a general act with local application; but under Article XIV, Section 270, of the Alabama Constitution of 1901, districting changes in the Mobile County school system could be effected only by a local act (Brown J.S. App. 25b-26b).

[24] The two opinions contain a number of identical findings and conclusions, and the rationale for finding an unconstitutional denial of voting rights is the same for both.

In each case it held for the plaintiffs, concluding that the at-large electoral systems at issue unlawfully operate " 'to minimize or cancel out the voting strength' " of black citizens (quoting *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143) by "restricting their access to the political process" (Bolden J.S. App. 33b, 41b; Brown J.S. App. 39b, 45b).[25]

The court determined that the State of Alabama had no clear-cut policy either favoring or disapproving at-large elections of local representative bodies, but that both the city and the county had long-established preferences for electing, respectively, the City Commission and the Board of School Commis-

[25] The so-called "*Zimmer* factors" used by the court in its analysis are virtually identical to factors considered by the district court in *Graves* v. *Barnes*, 343 F. Supp. 704, 724-734 (W.D. Tex. 1972) (per curiam) (three-judge court), aff'd in pertinent part *sub nom. White* v. *Regester*, *supra*. (See discussion, pages 42-46, *infra*.) *Zimmer* identified "primary criteria" relevant to the issue of denial of access or vote dilution and "enhancing criteria" referring to the existence of characteristics of the electoral structure that enhance dilution. 485 F.2d at 1305. The primary criteria listed were: (1) accessibility of the minority group in question to the political process (such as candidate slating); (2) responsiveness of representatives to the group's special political interests; (3) the weight of the state policy supporting the at-large system; and (4) the existence vel non of past discrimination that might preclude effective political participation by members of the group. *Ibid.* The enhancing criteria were: "[E]xistence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Ibid.* (The enhancing criteria are similar to those identified by this Court in *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143-144.)

sioners by at-large voting (Bolden J.S. App. 19b, 37b-38b; Brown J.S. App. 19b, 42b-43b). The court further concluded that these at-large systems were initially established without discriminatory purpose, since blacks were effectively disfranchised by other means at the time of the relevant enactments (Bolden J.S. App. 28b; Brown J.S. App. 34b). This history is nonetheless insufficient, the court found, to preclude a finding of present unlawfulness, in light of evidence that in recent years the systems have served to dilute the black vote and have been maintained for this purpose by "intentional state legislative inaction" (Bolden J.S. App. 31b; Brown J.S. App. 37b).

In each case the court's finding of present unlawfulness was based in part on the subsidiary findings that, as a result of (1) the history of racial discrimination in the city, the county, and the state, (2) the pattern of racially polarized bloc voting, and (3) certain structural features of the electoral system—notably the relatively large size of the city and the county, the lack of district residency requirements for candidates, and majority vote requirements—there is no reasonable expectation that either blacks or persons strongly identified with their interests can be elected so long as elections remain at-large (Bolden J.S. App. 34b-35b, 38b-40b, 42b; Brown J.S. App. 13b, 40b-41b, 43b-45b, 47b). The candidates elected in these at-large systems, the court found, have been unresponsive to the interests of black citizens, and this unresponsiveness clearly reflects the

powerlessness of blacks in the political process (Bolden J.S. App. 35b-37b; Brown J.S. App. 13b-18b, 41b-42b).[26] Despite the obvious crippling effect of the at-large systems on black voters as a group, the representatives to the two state legislative bodies from districts in the City and County of Mobile have failed to exercise their critical influence to enact valid legislation to remedy the problem (Bolden J.S. App. 29b-31b; Brown J.S. App. 35b-37b).

The court rejected defendants' arguments that this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), regarding the intent requirement for violations of the Equal Protection Clause, preclude finding a constitutional violation under the test of *White* v. *Regester* absent a showing that the voting system under challenge was originally adopted for discriminatory reasons (Bolden J.S. App. 22b-32b; Brown J.S. App. 27b-37b). The district court concluded that a violation may still be found where evidence adduced under the tests used in this Court's vote dilution cases shows "a present purpose to dilute the black vote" (Bolden J.S. App. 31b; Brown J.S. App. 37b).

2. In *Bolden*, the district court's judgment directed that the August 1977 city elections be conducted pur-

[26] Regarding the Board of School Commissioners in *Brown*, the district court found evidence of nonresponsiveness in the recalcitrance the commissioners displayed throughout the litigation in *Davis* v. *Board of School Commissioners of Mobile County*, *supra* (Brown J.S. App. 13b-18b).

suant to a plan to be developed later, featuring a mayor elected at-large and nine councilmen elected from single-member districts (Bolden J.S. App. 1c-3c). In a subsequent order, the court specified in detail a plan for the form of the new government and the boundaries of the districts from which the councilmen were to be elected (*id.* at 1d-63d). This plan was based in part on one submitted by a committee of three chosen by the court from names suggested by the parties (*id.* at 1d).[27] The order for the August 1977 elections was stayed by the district court pending defendants' appeal, and a subsequent order for elections on November 21, 1978, was stayed by the district court pending the further order of this Court (Bolden A. 37).[28]

3. In *Brown*, the district court's judgment ordered that the county be divided into five single-member districts from which members of the Board of School Commissioners would be elected (Brown J.S. App. 2d). Three of the incumbent commissioners lived in what would become district 2, and the terms of all but one incumbent, who lived in what was to be district 4, were due to expire at a time after 1978 (*id.* at 3d-4d). To avoid shortening the term

[27] The defendants declined the court's initial request to submit a proposed single-member district plan and its later invitation to propose changes in the plan devised by the three-member committee (Bolden J.S. App. 1d). Plaintiffs both submitted their own plan and later made recommendations concerning the committee plan (*ibid.*).

[28] On October 16, 1978, Mr. Justice Powell denied plaintiffs' application to vacate the stay (Bolden A. 38).

to which any incumbent had been elected, the court directed (1) that the single-member district system be introduced in stages, with commissioners for districts 3 and 4 to be elected in 1978, a commissioner for district 5 in 1980, and commissioners for districts 1 and 2 in 1982, and (2) that the Board consist of six members between 1978 and 1980, with the sixth member to be a chairman who would vote only to break a tie (*id.* at 3d-5d).[29] The elections in districts 3 and 4 were held on November 7, 1978, and two black candidates nominated in the September primary were elected without opposition.[30]

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[29] When defendants appealed the order requiring the change to single-member districts, plaintiffs cross-appealed from the district court's failure to order elections in 1978 for all five districts created by the court's decree (Williams A. 151a-152a).

[30] During the period between the primary and general elections, the incumbent Board took several actions that appellees claimed were intended to frustrate the district court's order. First, the Board failed to elect a non-voting chairman as required by the court. Then the Board, preparatory to becoming a six-member body with two black members, adopted a series of rules enhancing the power of any subsequently appointed or elected non-voting chairman and requiring four votes for passage of important procedural and substantive measures. The district judge held three Board members in contempt for their obstructive actions. On October 27, 1978, Mr. Justice Powell issued an order staying the contempt proceedings and the November elections. On October 31, 1978, Mr. Justice Powell vacated the portion of his previous order staying the November elections. The district court thereafter entered an injunction (a) appointing Commissioner Alexander chairman for one year and Commissioner Drago for the next; (b) enjoining the new rules adopted by the Board; and (c) enjoining the new Board from voting to dismiss this appeal. (Order on Selection of School Board Chairman and on Plaintiffs' Motion to Enjoin New Board Policies, etc., dated November 24, 1978.)

F. The Court of Appeals' Decisions

On review, in decisions by separate panels, the court of appeals affirmed the district court's judgment in each case (Bolden J.S. App. 1a-17a; Brown J.S. App. 1a-2a).

Bolden was decided together with three other "dilution" cases, according to the rationale set out in the lead case, *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978). In *Nevett*, the panel majority acknowledged that racially discriminatory purpose is a necessary element of any violation of the guarantee of equal access to the political process.[31] Even *White* v. *Regester*, *supra*, and *Zimmer* v. *McKeithen*, *supra*, are "purpose" cases, the court reasoned. Because racially dilutive effect is established simply by a showing of racially polarized voting in an at-large system of elections, the additional factors specified in those cases must bear not on effect, but on purpose. *Nevett*, *supra*, 571 F.2d at 222. Purpose to discriminate need not, however, be manifest at the inception of

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[31] In a separate opinion, Judge Wisdom expressed the view that racially discriminatory effect, alone, should be sufficient for finding that an apportionment scheme violates the Equal Protection Clause of the Fourteenth Amendment and abridges or denies access to the political process on account of race within the meaning of the Fifteenth Amendment and its implementing statutes. See *Nevett*, *supra*, 571 F.2d at 231.

the plan (571 F.2d at 219-220 n.13): "All that is necessary is that the invidiously disproportionate impact 'ultimately be traced to a racially discriminatory purpose.' [*Washington* v.] *Davis*, 426 U.S. at 240."

The court discussed two ways other than proof of discriminatory purpose in the enactment by which the requisite invidious intent may be shown. First, if there is direct evidence that the system was continued *in order that* blacks would not be able to be elected, "the necessary intent is established" (*id.* at 222). The opinion in *Nevett* characterized the *Bolden* case as going off on such direct evidence (*ibid.*). In *Bolden* itself, the court of appeals gave special attention to two findings of the district court in this connection: (1) the finding that whenever *any* redistricting bill is introduced in the state legislature, "a major concern has centered around how many, if any, blacks would be elected," and (2) the finding that the 1965 enactment that locked in the at-large system by giving predetermined functions to the commissioners was "recent action * * * probative of an intent to maintain the plan * * *" (Bolden J.S. App. 14a). Thus the very longevity of the system for electing the City Commission in Mobile "is wholly consistent with the [district] court's ultimate conclusion that the plan has been maintained [for] the purpose of debasing black political input" (*id.* at 10a).

Second, the court of appeals explained, a plan may be found unconstitutional even without such direct evidence of purpose, if it has *become* a device for

excluding a group from effective participation in the political process. *Nevett*, *supra*, 571 F.2d at 222. Past and present unresponsiveness to the needs of blacks tends to show that elected officials realistically regard blacks as outside of their constituency. Other *Zimmer* factors, if found to be present, support the inference that the at-large system is functioning to implement racially discriminatory objectives. Since the district court in *Bolden* found almost all the *Zimmer* factors in favor of plaintiffs, and its findings were not clearly erroneous, those findings outweigh the city's interest in maintaining its at-large plan (Bolden J.S. App. 12a).

The court of appeals' unreported decision in *Brown* was summary. It held, citing *Bolden*, that none of the district court's findings was clearly erroneous, that the district court applied the law correctly, and that the relief was within the scope of the district court's equitable discretion (Brown J.S. App. 1a-2a).

SUMMARY OF ARGUMENT

I

1. In *White* v. *Regester*, 412 U.S. 755, 765 (1973), aff'g *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court), this Court held that a showing that multimember districts in a state legislative reapportionment plan "are being used invidiously to cancel out or minimize the voting strength of racial groups" establishes a violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs' burden is to show not merely that a racial group "has not had legislative seats in proportion to

its potential" but that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents * * * to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765-766.

In *White* v. *Regester* the Court sustained such claims raised by blacks in Dallas County, Texas, and Mexican-Americans in Bexar County, Texas, on the basis of factual findings made by the three-judge district court from "its own special vantage point." *Id.* at 769. Both claims rested in part on the history of racial discrimination in Texas, and on certain features "of the Texas electoral [scheme that] * * * enhanced the opportunity for racial discrimination," *e.g.*, the "place" rule, requiring each candidate to run for a particular place on the ballot and resulting in "a head-to-head contest for each position," and the absence of subdistrict residency requirements—which would even permit all the candidates to reside on a single block. *Id.* at 766-767. In addition, the district court had found with respect to Dallas County that few blacks had been elected from the county since Reconstruction days, that blacks lacked access to the candidate slating process for the Democratic primary, that racial campaign tactics were used to defeat candidates with support from the black community, and that the Dallas County delegation to the legislature did not truly represent the interests of the black community in Dallas. *Graves* v. *Barnes*, *supra*, 343 F. Supp. at 726-727. The district court

had found with respect to Bexar County (1) that few Mexican-Americans had been elected representatives from that county, despite the fact that Mexican-Americans were a population majority there; (2) that the present effects of past discrimination against Mexican-Americans discouraged them from registering to vote; (3) that Anglos voted heavily for Anglo candidates in the primary elections and for Democrats in the general election; and (4) that the Bexar County delegation was unresponsive to the concerns of Mexican-Americans. 343 F. Supp. at 730-733.

Although the state apportionment plan involved in *White* v. *Regester* was recent, multimember districts had a long history in Texas. Thus *White* v. *Regester* applies to discriminatory adherence to at-large voting schemes with dilutive effects as well as to the discriminatory adoption of such schemes.

2. Neither logic nor precedent suggests any reason why the *White* v. *Regester* standard does not equally apply to at-large voting schemes for local government bodies. Precisely the same kinds of exclusion of racial groups from an opportunity for equal participation in the political process can occur, and the Equal Protection Clause applies to political subdivisions as well as to states. *Avery* v. *Midland County*, 390 U.S. 474, 479 (1968). Although consideration of the need of local governments for municipal arrangements that meet their varying individual requirements calls for some flexibility in determining whether local districting plans have met the constitutional one person, one vote requirement

(*Abate* v. *Mundt*, 403 U.S. 182 (1971)), the Equal Protection Clause forbids local, as well as state-wide, governments from maintaining an at-large voting scheme that implements an invidious purpose to cancel out the voting strength of a racial or ethnic group. See *Dusch* v. *Davis*, 387 U.S. 112, 116 (1967); *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976); *Abate* v. *Mundt*, *supra*, 403 U.S. at 184 n.2.

3. The *White* v. *Regester* standard is consistent with this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), holding that official action that has a racially disparate effect violates the Equal Protection Clause only if it is also shown to be purposeful discrimination. The weight to be given disparate impact as an indication of discriminatory purpose and the types of additional evidence needed in order to prove purposeful discrimination necessarily vary with the type of state action in question. *Arlington Heights*, *supra*, 429 U.S. at 266.

In vote dilution cases under *White* v. *Regester*, at least three categories of indicia of discriminatory purpose are considered: (1) present disparate effect; (2) a history of discrimination in other matters tending to suggest that racial animus is a factor that motivates or perpetuates the scheme; and (3) unresponsiveness of the elected body to the submerged minority community, tending to demonstrate that the elected officials do not regard that minority as a part of their constituency.

Nothing in *White* v. *Regester* precludes courts from affording defendants an opportunity to show substantial nonracial purposes served by adhering to the challenged electoral scheme or from ruling for defendants if evidence of nondiscriminatory reasons for adhering to the schemes outweighs plaintiffs' evidence of purposeful discrimination.

II

The district court's findings in the present cases support its conclusions that each of the challenged at-large schemes operates to cancel out or minimize the voting strength of the black minority and has been intentionally maintained for this purpose.

1. Analyses of election results reveal not only that no blacks and only one black-identified candidate have ever been elected to either the Mobile City Commission or the Mobile County Board of School Commissioners but also that increased black voter registration and highly visible support in the black community for a particular candidate produce a heavy vote among the white majority for the opposing candidate. Structural features of the electoral schemes similar to those of the Texas counties in *White* v. *Regester* enhance the effects of racially polarized voting. Thus the more that blacks seek to exercise their political rights, the less they enjoy any political effectiveness. This phenomenon is the functional equivalent of the closed slating process in *White* v. *Regester*.

2. The election results themselves not only show discriminatory effect, but also are indicative of discriminatory purpose in maintaining these at-large schemes. Other evidence of such purpose in each case includes the long history of racial discrimination in Alabama in matters affecting the franchise, the evidence that the number of blacks likely to be elected is considered whenever any alternative districting scheme is introduced in the state legislature, and the unresponsiveness of both the city commission and the school board to the particularized interests of blacks.

3. Cognizable evidence of substantial nonracial purposes for maintaining the challenged electoral schemes was not offered in either case. The defense of the commission form of government in *Bolden* came down simply to a defense of at-large voting in itself, since the *Bolden* defendants did not attempt to show that other features of commission government were inconsistent with anything but a purely at-large electoral scheme. At-large voting was likewise the only feature of the electoral scheme at issue in *Brown*. In both cases the claimed justification for at-large voting was essentially that it produced political representatives with a broad, rather than a parochial, view. But where, as in these cases, voting is strongly polarized along racial lines, the broad view is likely to be simply the view of the majority racial group. Reliance on this justification in these circumstances, therefore, tends more to suggest discriminatory purpose than to disprove it.

III

The Fifteenth Amendment provides an independent, alternative ground for affirming the judgments in these cases. It prohibits those denials and abridgments of the franchise on account of race that would constitute purposeful discrimination under the Equal Protection Clause, and it also forbids official maintenance of electoral schemes that enhance the effects of private racial bias in voting and unfairly cancel out the voting strength of a racial minority, whether or not invidious racial purpose is shown on the part of those who adopt or maintain the schemes.

This construction of the Fifteenth Amendment accords with the congressional purpose in its adoption, represents a reasonable reading of its language, is consistent with this Court's decisions under the Fifteenth Amendment, and indeed follows logically from the decision of this Court in *Terry* v. *Adams*, 345 U.S. 461 (1963). In *Terry* this Court struck down, as violative of the Fifteenth Amendment, a state electoral scheme that permitted racially segregated political primaries conducted by a private group to deny black voters meaningful participation in the political process. The electoral schemes challenged in the present cases similarly enhance the effects of racial bloc voting and thereby abridge exercise of the franchise by the black minority.

IV

The district court properly exercised its remedial discretion in each of the present cases in ordering

the implementation of single-member district plans, since at-large voting was the primary cause of the submergence of the black vote in the challenged electoral schemes. Although a plan other than the strong-mayor-council plan adopted in *Bolden* (such as a plan preservative of some features of the commission form of government) might have been constitutionally permissible, the *Bolden* defendants suggested no plan that did not retain at-large voting for all elective positions. The strong-mayor-council plan had the support of a number of witnesses and, in its division of power between mayor and council, is similar to plans used in two large Alabama cities. In both cases the State remains empowered to adopt alternative forms of representation that are constitutionally permissible and meet the requirements of the Voting Rights Act of 1965.

ARGUMENT

I THE EQUAL PROTECTION STANDARD OF *WHITE* v. *REGESTER* GOVERNS THESE CASES

A. *White* v. *Regester* Synthesizes Principles of Apportionment Cases and Racial Discrimination Cases

The "right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964), citing *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). The Equal Protection Clause of the Fourteenth Amendment protects this central right against direct and obvious infringements, such as outright denials of the right to vote based on unwarranted classifications (*e.g.*, *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969), and *Carrington* v. *Rash*, 380 U.S. 89 (1965)) and against indirect and less obvious infringements, such as burdensome registration requirements that unjustifiably exclude a given class of persons from exercise of the franchise (*e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)) and malapportioned legislative districts that result in "the debasement or dilution of a citizen's vote" if he lives in a district allotted relatively fewer representatives than other districts by the existing apportionment scheme (*e.g.*, *Reynolds* v. *Sims*, *supra*). The Equal Protection Clause, of course, independently protects persons against state action that discriminates on the basis of race, whether or not that discrimination touches the right to vote. *Brown* v. *Board of Education*, 349 U.S. 294 (1955).

The present cases involve both the right of the black residents of the City and County of Mobile to be free from racial discrimination operating through particular electoral schemes and their right to have their votes accorded the same weight as those of other voters in those jurisdictions.

In several of its early cases concerning vote dilution claims based on the asserted affects of apportionment schemes providing for the at-large election of a number of representatives from a single political subdivision, this Court recognized that, although multimember district systems were not unconstitutional per se, such a system might be subject to

challenge in a particular case if it operated "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb* v. *Chavis*, 403 U.S. 124, 142-143 (1971), quoting *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965), and *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966). This dictum suggested a synthesis of apportionment principles with the recognized constitutional proscription of racial discrimination. Some of the limits of that synthesis were indicated in *Whitcomb* v. *Chavis*, *supra*, in which this Court rejected a racially based vote dilution claim for failure of proof. The synthesis was most fully elaborated in *White* v. *Regester*, 412 U.S. 755 (1973), in which two such claims were upheld.

In *Whitcomb* the Court rejected the claim that residents of a black ghetto in Marion County (Indianapolis) Indiana had been subjected to invidious discrimination, despite the fact that "the number of ghetto residents who were legislators was not in proportion to ghetto population" (403 F.2d at 149). It did so because "nothing in the record or in the court's findings [indicated] that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen."

In *White* v. *Regester*, the Court clarified the implications of its negative holding in *Whitcomb*: proof of unlawful vote dilution need not include any one of those particular factors missing in *Whitcomb*, but the evidence must add up to exclusion of the minority

group from meaningful access to the political process. "The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White* v. *Regester*, *supra*, 412 U.S. at 766. Denial of access to the political process, thus, is the ultimate finding of fact that triggers the legal conclusion that a particular multimember districting scheme or other at-large electoral system is unconstitutional. Determining whether such a denial is taking place is not a simple task, for it cannot be inferred automatically from the failure of black-supported candidates to win elections. 412 U.S. at 765-766. The determination requires that the district court make "an intensely local appraisal of the design and impact" of the electoral scheme at issue "in the light of past and present reality, political and otherwise." 412 U.S. at 769-770.

In *White* v. *Regester*, then, the essential factual analysis supporting the finding of the constitutional violation is that of the district court (*Graves* v. *Barnes*, 343 F. Supp. 704, 724-734 (W.D. Tex. 1972) (three-judge court)), speaking "from its own special vantage point." *White* v. *Regester*, *supra*, 412 U.S. at 769-770. The district court in *Graves* v. *Barnes* focused on four structural features and five dynamic characteristics of the multimember state legislative

elections in Dallas County and Bexar County, Texas, to determine if the black vote and the Mexican-American vote in those counties, respectively, were being invidiously minimized or cancelled out by use of the at-large system. Both districts were large in terms of both population and physical size. In these counties, as in all Texas counties, the primary could be won only by a majority vote; in both the primary and the general election, each candidate had to run for a particular place on the ballot, with the result that each candidate was locked into a single head-to-head contest for a legislative position; and candidates were not required to live in any subdistrict, *i.e.*, it was possible for the entire membership of the delegation to reside on the same city block. See 343 F. Supp. at 725.

The dynamics of exclusion in the two counties were not identical, although in neither case had blacks or Mexican-Americans served in the Texas legislature in anything near their proportion of the population. *Id.* at 726, 732. In Dallas County, a white-dominated slating organization had the power to choose a slate of candidates to run in the all-important Democractic primary, and regularly excluded from its slates both blacks and persons whom blacks would be particularly interested in supporting. *Id.* at 726. If such a person nonetheless ran against the officially slated candidates in the primary, overt racially oriented campaign tactics would be used to bring out the white vote and defeat him. *Id.* at 727.

In Bexar County, there was no formal slating process, but severely polarized racial bloc voting in the Democratic primary assured that no Mexican-American survived as a Democratic candidate in the virtually pro forma general election. 343 F. Supp. at 731. The upshot, in both instances, was that minority interests were rarely represented in the general election.

In both counties there was a long history of discrimination. The minority groups had in earlier times been excluded from access to the political processes by more blatant means—blacks by white primaries and poll taxes, Mexican-Americans by restrictive registration procedures which, combined with linguistic and cultural barriers, made it unlikely they would attempt to register and vote. *Id.* at 725, 731. Because those cultural barriers continued to inhibit Mexican-Americans from registering and voting even in the early 1970's, it was impossible for them to affect the political process even where they were, as in Bexar County, a potential electoral majority (*ibid.*).

Finally, the district court discerned a clear symptom of political exclusion in the continuing unresponsiveness of the Dallas and Bexar County delegations to the particularized interests of blacks and Mexican-Americans. In the 1950's, for example, the Dallas County delegation had led the state legislature's campaign to preserve segregation (*id.* at 726); and the Bexar County delegation had never sponsored any legislation to relieve the plight of Mexican-

Americans, who had long borne the problems of poor housing, poor education, and other concomitants of persisting poverty (*id.* at 725-726, 730, 732).

On the basis of these factors, then, the district court concluded that the *Whitcomb* v. *Chavis* standard had been met: the minorities in both counties were effectively excluded from the political processes and had less opportunity than did whites to elect representatives of their own choosing. On the basis of the district court's findings, this Court affirmed. *White* v. *Regester*, *supra*, 412 U.S. at 767, 769-770.

Although *White* v. *Regester* dealt with districts that were part of a recent reapportionment plan for the Texas legislature,[32] its rationale regarding the racially based vote dilution claim was in no way limited to *changes* in a system made so as to exclude minorities, for the multimember district feature of the scheme had existed for decades. Nor was the Court concerned with the precise reasons motivating the original adoption of multimember districts in Texas. Rather, it looked to the district court's findings concerning how the districting system was operating in Dallas and Bexar counties to determine whether it was "*being used* invidiously to cancel out or minimize the voting strength of racial groups." 412 U.S. at

[32] Recent changes were relevant for a separate part of the case that concerned population deviations among a number of the districts created by the reapportionment plan, but the claim there rested on "one person, one vote" principles. 412 U.S. at 761-764.

765 (emphasis added).[33] Thus, in striking down multimember districts for Dallas and Bexar counties, this Court acted upon two premises already well established in its apportionment decisions: (1) an apportionment scheme, whenever passed, is always "state action" for Fourteenth Amendment purposes; and (2) denial of equal protection of the laws can be, and often is, accomplished by deliberate state adherence to the same apportionment scheme as well as by a shift to such a scheme.[34]

[33] With respect to the Bexar County district, the district court observed that "a State may not design a system that deprives [racial or ethnic minorities] of a reasonable chance to be successful [in the political process]." 343 F. Supp. at 734. Echoing that language, this Court noted that the district court had concluded that "the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life * * *." 412 U.S. at 769. No such language was used in either opinion in the analysis of the Dallas County district, however; and the district court made no specific inquiry into the reasons motivating those who originally adopted a multimember district system for Texas. Hence, the references to "design" cannot be taken as indications that a system *maintained* for a discriminatory purpose is impervious to constitutional challenge if it was not originally adopted to serve that purpose.

[34] The Fifth Circuit has explicitly acknowledged those premises in a number of dilution cases. For example, in *Paige* v. *Gray*, 538 F.2d 1108, 1111 (1976), that court said: "[T]he Supreme Court has never indicated that its dilution principles should only be used to test recently enacted provisions. To the contrary, *White* struck down a multimember scheme which had been in operation since at least 1914, although the specific charter provisions at issue were of more

Nor is the *White* v. *Regester* rationale limited by logic or precedent to state-wide electoral schemes, as appellants in No. 78-357 suggest (Br. 52-54, 64-69). See also *Wise* v. *Lipscomb*, No. 77-529 (June 22, 1978) (opinion of Rehnquist, J.). This Court held in *Avery* v. *Midland County*, 390 U.S. 474, 479 (1968), that "[t]he Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State." In *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970), it made clear that special purpose governmental bodies such as school boards, as well as governing bodies with broader powers, are within the reach of that clause, so long as their members are selected by popular election. *Avery* and *Hadley* were, to be sure, "one person, one vote" apportionment cases, and it is also true that this Court has consistently noted its concern in such cases that "[i]n assessing the constitutionality of various apportionment plans" an allowance be made for the fact that "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs * * *." *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971) (citation omitted).

Local government at-large electoral schemes, however, may be used as easily as state multimember

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recent vintage." In *Wallace* v. *House*, 515 F.2d 619, 633 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1976), the court noted: "At-large voting in aldermanic elections has been the state policy of Louisiana since 1898."

legislative districts to exclude minorities from effective participation in the political process; and the desirability of allowing for diversity and flexibility in local government arrangements cannot justify such a discriminatorily operated local at-large scheme.[35] Thus, in *Dusch* v. *Davis*, 387 U.S. 112 (1967), in which this Court held that "one person, one vote" principles were not violated by a metropolitan government plan calling for the imposition of borough residency requirements on an at-large system, the Court noted that the "constitutional test under the Equal Protection Clause is whether there is an 'invidious discrimination.'" 387 U.S. at 116. The district court in *Dusch* had found no such discrimination; but, as this Court observed, quoting from the district court's unreported opinion, the plan could be scrutinized once it was in effect to see if it operated "'to minimize or cancel out the voting strength of

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[35] Permitting "slightly greater percentage deviations" from strict population equality in "local government apportionment schemes" than are allowed for state legislative apportionment plans (*Abate* v. *Mundt*, *supra*, 403 U.S. at 185) is quite a different matter from permitting a local government deliberately to maintain a system that excludes minorities from the political process (*id.* at 184 n.2). A substantial nonracial interest served by a particular local government electoral scheme might, in some cases, however, serve to rebut evidence that the scheme was maintained for an invidious discriminatory purpose. We discuss this point in detail below (pages 59-61). Only at-large voting is truly at issue in the present two cases, and it is entirely conceivable that other features of the commission form of government in the City of Mobile could be retained without injury to any person's constitutional rights (see point IV, *infra*).

racial or political elements of the voting population.'" 387 U.S. at 117. Similarly, in *Beer* v. *United States*, 425 U.S. 130 (1976), in considering the validity, under Section 5 of the Voting Rights Act of 1965, of a reapportionment plan for a city council that provided for five single-member councilmanic districts and two at-large seats, this Court found no cognizable statutory claim (in the absence of a discriminatory purpose in adopting the plan) because the plan improved minority representation on the council; but the Court nonetheless noted that such a plan could be invalidated on constitutional grounds if it discriminated on the basis of race. 425 U.S. at 142 n.14.[36] No constitutional claim had been made in *Beer*, however, and the Court suggested that this was understandable in view of the fact that the plan did not "remotely approach a violation of the constitutional standards enunciated" in *Fortson* v. *Dorsey*, *supra*, *Burns* v. *Richardson*, *supra*; *Whitcomb* v. *Chavis*, *supra*, and *White* v. *Regester*, *supra*. 425 U.S. at 142-143.[37]

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[36] Indeed, the Court noted that the plan could be invalidated even if it were "a substantial improvement over its predecessor in terms of lessening racial discrimination," so long as it continued "so to discriminate on the basis of race or color as to be unconstitutional." *Ibid.*

[37] Although this Court in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 638 (1976), affirmed the court of appeals' judgment in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), "without approval of the constitutional views expressed by the Court of Appeals," it did not reject the proposition that *White* v. *Regester* applies, in a proper case, to at-large systems for electing local government bodies. Moreover, the Fifth Circuit has since, in *Nevett* v. *Sides*, *supra*, explained its *Zimmer* analysis more carefully within the framework of traditional equal protection principles (see pages 31-33, *supra*).

White v. *Regester*, then, sets a standard by which to test claims that a particular system for electing political representatives—whether it is multimember state legislative districts or other systems of at-large voting—is being used invidiously to exclude a minority group from the political process, and therefore violates the Equal Protection Clause. That standard, as we show below (pages 51-57), is consistent with this Court's subsequent decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), concerning the showing of intent required for establishing a violation of the Equal Protection Clause in a racial discrimination case. It is thus the standard that properly governs the Fourteenth Amendment claims in the two cases here.

B. The Standard of *White* v. *Regester* is the Equal Protection Standard Prohibiting Purposeful Discrimination

In *Washington* v. *Davis*, *supra*, this Court held that official action will not be held unconstitutional solely because it has a racially disproportionate effect. To establish a violation of the Equal Protection Clause, the Court held, proof of a discriminatory purpose must be shown. We agree with the view expressed by the Fifth Circuit in *Nevett* v. *Sides*, 571 F.2d 209, 219 (5th Cir. 1978) (see page 31 *supra*) that this proposition applies to all Fourteenth Amend-

ment racial discrimination claims, including those involving vote dilution.

This Court made it clear, however, that discriminatory purpose need not be express (426 U.S. at 241); for "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S. at 242. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court elaborated on its *Davis* holding, explaining that the "sensitive inquiry" into purpose might be easier, and the probative weight of impact alone greater, in some types of cases than in others. 429 U.S. at 266. As Mr. Justice Stevens had observed in his concurring opinion in *Davis* (426 U.S. at 253):

> The requirement of purposeful discrimination is a common thread running through the cases summarized in Part II [of the Court's opinion]. These cases include criminal convictions which were set aside because blacks were excluded from the grand jury, a reapportionment case in which political boundaries were obviously influenced to some extent by racial considerations, a school desegregation case, and a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of

> deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Racially based vote dilution cases decided under *White* v. *Regester*, like the two instant cases, necessarily involve different "evidentiary considerations" from those in *Davis* and *Arlington Heights*. This is so in part because the claim concerns not a particular recent decision to take a certain action but rather the invidiously discriminatory maintenance and use of a system that may not have been discriminatory at its inception, and in part because, as noted above (page 41), apportionment principles, as well as racial discrimination law, are concerned.

The reapportionment decisions do not speak in terms either of "purpose" or of "effect." In that context, a purpose to subordinate the "one person, one vote" principle to other considerations (however identified) is inseparable from the effect of doing so (and therefore is properly presumed) and is constitutionally impermissible. *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973). It would, in any event, take little imagination to discern purpose when state legislators, whose members owe their office to a "rotten borough" electoral base, decline to alter representative districts. Nor are those representatives' constituencies likely to endorse candidates who would promise, if elected, to divest the "rotten boroughs" of their disproportionate power in the legislative body. Thus,

this Court's ultimate decision to enter the "political thicket" (*Colegrove* v. *Green*, 328 U.S. 549, 556 (1946)) was based upon the recognition that abridgment of the right to an effective vote, whether by means of apportionment or otherwise, is not amenable to change through conventional political processes.

Because *White* v. *Regester* concerned not merely deliberate discrimination lacking a rational basis but invidious *racial* discrimination, this Court did not limit its inquiry to whether the scheme in question assured quantitatively greater political representation to certain classes of voters without any rational justification. Indeed, it acknowledged that a multimember district cannot be held unconstitutional simply because a distinct racial group fails to win "legislative seats in proportion to its voting potential," 412 U.S. at 765-766.[38] The types of evidence indicative of intent to which the Court looked fall into three categories: (1) present disparate effect; (2) a history of discrimination in other matters tending to suggest that racial animus is a factor that motivates and perpetuates the scheme; and (3) unresponsive-

[38] Single-member districts are, of course, preferred in court-ordered plans, even without proof that a racial group is adversely affected by multimember districts. *Wise* v. *Lipscomb*, *supra*; *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); *Connor* v. *Johnson*, 402 U.S. 690 (1971). They tend to further representative government by, *inter alia*, reducing campaign costs, easing direct communication with representatives, and discouraging bloc voting. *Connor* v. *Finch*, 431 U.S. 407, 415 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 19 (1975). See also *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 731, n.21 (1964).

ness of the elected body to the submerged minority community, tending to demonstrate that the elected officials do not regard that minority as a part of their constituency.

The first category—present disparate effect—can, as this Court has noted in both *Davis* (426 U.S. at 241, 242) and *Arlington Heights* (429 U.S. at 266), be a strong indicator of discriminatory purpose. As to the second category—history of racial discrimination—it is a familiar principle that inferences may be drawn from evidence of "similar transactions and happenings." McCormick on *Evidence* § 164 (1954 ed.). Hence, where there is a history of official racial discrimination and another substantial disparity occurs, it is permissible to draw at least the tentative inference that race has again been a motivating factor.[39] Finally, regarding evidence of unresponsiveness, as the Fifth Circuit has explained in *Nevett* v. *Sides*, *supra*, 571 F.2d at 220, a finding that this factor is absent, *i.e.*, that the elected representatives do respond to the concerns of the racial minority in question, "weighs heavily against an inference of intentional discrimination because the incumbents are not visibly exploiting their majority status to the detriment of minority constituents." A finding of unresponsiveness would, of course, indicate the oppo-

[39] Appropriately, for present purposes, the example chosen by the Court in *Arlington Heights* (429 U.S. at 267) for this proposition was *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), aff'd per curiam, 336 U.S. 933 (1949), in which Alabama's "interpretation" test was held invalid.

site.[40] In sum, we submit that the violation found in *White* v. *Regester* was purposeful discrimination. But see *Black Voters* v. *McDonough*, 565 F.2d 1, 4 n.6 (1st Cir. 1977) (dictum).

As appellants in No. 77-1844 note (Br. 28), this Court's decision in *Arlington Heights* indicates that defendants charged with racial discrimination violative of the Equal Protection Clause may rebut a prima facie case—*i.e.*, a showing that the challenged state action was motivated at least in part by a ra-

[40] In determining whether the at-large system had discriminatory impact, the courts below, as did the district court in *Graves* v. *Barnes*, *supra*, took note of the way in which particular at-large systems allowed private prejudice, in the form of racial bloc voting, to succeed in excluding the minority group from effective participation in the political process. While we do not suggest that the existence of racial bloc voting in an at-large system, without more, makes out a violation of the Equal Protection Clause, it is highly pertinent. This Court has held on several occasions that a scheme of state action may be found invidiously discriminatory because it facilitates or implements racial discrimination by others. See, *e.g.*, *Norwood* v. *Harrison*, 413 U.S. 455 (1973) (state cannot supply free textbooks to private schools with racially discriminatory policies where the aid significantly supports the existence of a separate system of such schools); *Anderson* v. *Martin*, 375 U.S. 399 (1964) (state cannot require ballots to identify race of candidate); *Shelley* v. *Kraemer*, 334 U.S. 1, 19 (1948) (state courts cannot enforce restrictive covenants reflecting private discrimination); *Green* v. *County School Board*, 391 U.S. 430 (1968) (freedom-of-choice plan inadequate to desegregate public schools). In *Norwood* v. *Harrison*, *supra*, the textbook policy was found unconstitutional despite the fact that it had originated during de jure segregation of the public schools and thus embodied no racially discriminatory purpose of its own.

cially discriminatory purpose—by proving that the action in question was supported by other legitimate purposes and "would have resulted even had the impermissble purpose not been considered." 429 U.S. at 270-271 n.21. In applying this principle to vote dilution cases, we submit, a defendant's evidence of substantial nonracial purposes served by taking or continuing the particular state action in question should be weighed by the court against plaintiff's evidence indicative of improper racial purpose before the ultimate finding of invidious discrimination (or lack thereof) is made. As so applied, this principle is, as we show below, entirely consistent with *White* v. *Regester* and cases following it.

In stating this principle in *Arlington Heights*, this Court referred to its decision of the same day in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977). We see little applicability, however, of the holding in *Mt. Healthy* to vote dilution cases, beyond the way in which *White* v. *Regester* applied the general principle, later articulated in *Arlington Heights*, to such cases.

In *Mt. Healthy*, the Court held that where respondent, an untenured school teacher, had shown that his employer's disapproval of his exercise of First Amendment rights was a factor in his discharge, the district court should then have considered evidence proferred by the employer to show that the teacher would have been discharged for other reasons even if he had not chosen to exercise his First Amendment rights. The Court stated that the "constitutional

principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." 429 U.S. at 285-286. To protect an employee from a discharge that would have occurred anyway, simply because he engaged in such conduct, the Court suggested, would grant him a windfall and unnecessarily harm the employer's legitimate interests at the same time. *Id.* at 286. The "proper test," the Court explained, was one "which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Id.* at 287.

Minority citizens whose voting strength is minimized or cancelled out by a discriminatorily operated election scheme secure no windfall, however, when the scheme is modified to grant them equal opportunity for participation in the political process, even if it can be shown that the scheme might have been adopted or maintained for other reasons absent the improper racial motives of those maintaining and profiting from it. Nor can it fairly be argued that modification of such a scheme to overcome the dilutive effect is "not necessary to the assurance of [the] rights" of racial minorities subject to it—even though the scheme might have been a permissible one had there been no improper racial purpose. See *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Like subordination of the "one person, one vote" principle to other considerations in the reapportionment cases (see page 53, *supra*), intentional subordination to other considerations of the opportunity of a minority racial group for meaningful participation in the political process is, under *White* v. *Regester*, constitutionally prohibited.

It is entirely appropriate, however, after plaintiffs have shown an electoral scheme's disparate racial impact, together with other evidence indicative of discriminatory intent, to permit defendants to show that maintenance of the scheme in fact serves substantial nonracial purposes that could not be attained by any less dilutive system. It would then be for the court to determine whether defendants' countervailing evidence so outweighed plaintiffs' proof as to suggest that the system was not being "operated as [a] purposeful device[] to further racial * * * discrimination" (*Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 149). This would also assure appropriate consideration of the need of local governments for "flexibility in municipal arrangements" to meet "changing societal needs" (*Abate* v. *Mundt*, *supra*, 403 U.S. at 185).[41]

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[41] If this inquiry is made in the course of determining whether purposeful discrimination has been shown, there will be no occasion separately to consider whether an invidiously discriminatory electoral scheme is justified by a compelling state interest. If the court determines that defendants' evidence of substantial nonracial purpose in maintaining the scheme outweighs evidence indicative of improper racial purpose, there will be no purposeful discrimination against which to balance a compelling state interest. If, on the other hand, defendants' evidence of substantial nonracial purpose is found inadequate, then, a fortiori, no compelling state interest may be demonstrated.

In *White* v. *Regester*, this Court had no reason to weigh nonracial justifications for the multimember districts in Dallas and Bexar counties because the district court (343 F. Supp. at 717-718, 723) had found, in considering the use of multimember districts in the Texas reapportionment plan as a whole, that the state had no consistent policy favoring multimember districts in general, and the state's claim that Dallas was maintained as a multimember district to satisfy popular preference was contrary to the evidence, even if such a justification might otherwise suffice (see *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 (1964)).[42]

The Fifth Circuit, in applying its *Zimmer* criteria, drawn largely from *Whitcomb* v. *Chavis*, *supra*, and *White* v. *Regester*, *supra*, has in fact considered legitimate policy reasons proffered for particular electoral schemes in deciding whether violations of

[42] As this Court noted in *White* v. *Regester* (412 U.S. at 762 n.6), the district court's suggestion that what it saw as an irrational mixture of multimember and single-member districts in the state plan would be an adequate ground to invalidate the plan (343 F. Supp. at 717-718) was simply dictum, since the district court overturned the plan on the ground that large population variations among the districts made it unconstitutional under *Reynolds* v. *Sims*, *supra*. Although this Court reversed the *Reynolds* v. *Sims* holding and also observed that there was no authority for the proposition that "the mere mixture of multimember and single member districts in a single plan, even among urban areas, is invidiously discriminatory," it did not reverse the district court's factual findings on the question whether the state was acting on the basis of legitimate policy considerations in maintaining multimember districts.

the Equal Protection Clause have been made out. In *Zimmer* itself, the court saw this factor as aiding plaintiffs because it found no nonracial policy justification for the at-large electoral schemes in question. *Zimmer* v. *McKeithen*, *supra*, 485 F.2d at 1307. It made clear, however, in both *Nevett* v. *Sides*, *supra*, 571 F.2d at 228, and in its decision on review in No. 77-1844 (Bolden J.S. App. 9a-10a), that it regards the interest of a state or political subdivision in maintaining a particular electoral scheme a factor to be weighed against any showing of discriminatory intent made by plaintiffs under the other *Zimmer* criteria.

In sum, proof of a violation of the Equal Protection Clause under *White* v. *Regester* requires proof of purposeful discrimination, *i.e.*, proof that an electoral scheme has either been designed, or is being deliberately operated, as a device to exclude a racial minority from an equal opportunity to participate in the political process. The *White* v. *Regester* standard is therefore consistent with *Washington* v. *Davis* and *Arlington Heights*, and it permits adequate consideration of the interests of local governments in maintaining political systems that serve their diverse and changing needs. As we show in point II, *infra*, the courts below properly found constitutional violations under that standard.

II UNDER THE STANDARD OF *WHITE* v. *REGESTER*, THE COURTS BELOW CORRECTLY FOUND THAT THE CHALLENGED AT-LARGE SYSTEMS EFFECTIVELY IMPLEMENT A PRESENT PURPOSE TO MINIMIZE OR CANCEL OUT THE VOTING STRENGTH OF BLACK CITIZENS AND THEREBY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Blacks Are Effectively Excluded from the Political Process by Which the Mobile City Commission and the Mobile County Board of School Commissioners Are Elected

The immediate instrumentality by which whites assure that blacks will be denied representation is racially polarized bloc voting in Mobile. This phenomenon is not present in all jurisdictions—it was not present in Marion County, Indiana, for example—and where present, is not always controlling. In a large electorate, most identifiable group interests are those of some minority: business, labor, the old, the young and so forth. Majoritarian systems demand that these interests form coalitions. Any reasonably large cohesive group—and blacks are roughly one third of the Mobile electorate—would ordinarily be thought significant enough to be able to command a role in the building of a coalition, or several shifting coalitions. And so they do, in jurisdictions where the economic or social concerns that many blacks share with at least some whites are not prevented by racial considerations from playing an important role in the political process.

In Mobile, however, as the expert's "regression analysis" showed, and the district court found (Bol-

den J.S. App. 96), race is the single most important factor in the political process. Whites will not form coalitions with blacks; in any instance in which blacks are likely to vote as a bloc, whatever interests might otherwise divide whites are submerged in the overriding interest of defeating the candidate who would represent blacks. In one egregious example, the court found (*ibid.*), otherwise competing white factions actually made a formal agreement not to field more than one white candidate so that the white vote would not be split, but would coalesce to defeat the black candidate.

This process is the exact analogue of the exclusionary slating process in Dallas County, Texas, and functions in essentially the same manner as the exclusion of Mexican-Americans in Bexar County, Texas. Thus, the contention of appellants in No. 78-357 (Br. 46-49) that discrimination under *White* v. *Regester* may not be found because there were no formal barriers to political activity and no discriminatory slating organizations simply misses the point. Also, as in the case of the multimember district elections in Dallas County and Bexar County, structural characteristics of the electoral schemes at issue here enhance the effects of racial bloc voting. Both the City and the County of Mobile are large districts. The city commissioners and county school commissioners are all elected at-large to predesignated "places," without subdistrict residency requirements and by majority vote—in the primary in the case of the school commissioners, and in the nonpartisan

election in the case of the city commissioners (Bolden J.S. App. 4b-5b, 21b; Brown J.S. App. 6b, 8b, 22b, 44b).

Appellants also misconceive the importance of the polarized voting phenomenon when they argue that, after all, blacks do vote for white candidates (see, *e.g.*, No. 77-1844 Br. 22-23; No. 78-357 Br. 46-49). Where no candidate is particularly identified with black interests, blacks do indeed vote, but not as a bloc. This is most apparent in the Greenough-Bailey run-off discussed in the Statement, *supra* at page 16, note 21. Both the white vote and the black vote split in that election, and more blacks voted for the loser than for the winner. By contrast, where Langan has been a candidate, or Gerre Koffler (*supra* at pages 13-16), the court found (Bolden J.S. App. 10b) that whites coalesced around their opponents. The ironic effect, the court found, is that black political strength has decreased in direct proportion to the increase in black registration and voting since 1965 (*ibid.*), *i.e.*, the more blacks seek to exercise their political rights, the less effective they will be (see also Bolden A. 157-159, 574). In a system that incorporates the *White* v. *Regester* factors of at-large elections, majority vote, and "place" requirements, the ultimate effect is that none of the elected officials represent the interests of blacks—a fact which, as we show below (pages 74-77), is amply demonstrated by the officials' unresponsiveness to those interests.

Taking cognizance of this effect is not, as appellants argue (No. 77-1844 Br. 20-21; No. 78-357 Br.

21-22), either to make bloc voting itself constitutionally suspect or to demand "proportional representation." It is simply to apply a principle well established in the case law of racial discrimination: "In the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir.), aff'd, 371 U.S. 37 (1962), quoted in *Graves* v. *Barnes*, *supra*, 343 F. Supp. at 729-730, aff'd in part *sub nom. White* v. *Regester*, *supra*. This Court has recognized that the fact that the interests of a particular group are adequately represented—or even overrepresented—in proportion to their number in the electorate at least undermines a prima facie showing of purposeful discrimination against that group. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 165 (White, J.) and 179-180 (Stewart, J.) (1977). By parity of reasoning, where there is consistent underrepresentation of a racial or ethnic group, the opposite conclusion is at least indicated. See *Arlington Heights*, *supra*, 429 U.S. at 266. See also *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977).

Even a single-member district scheme, of course, will not necessarily provide electoral minorities with proportional representation. See *Connor* v. *Finch*, 431 U.S. 407, 428 (1977) (Blackmun, J., concurring in part). But where there is a high degree of residential segregation, fairly drawn single-member districts are likely to produce at least some representation for the interests of both blacks and whites. To

be sure, within any given single-member district there may still be racial bloc voting, and the individual voter who is a member of the minority race may find himself part of a perpetual electoral minority. This is not, however, the correct measure of dilution. The single-member district New York apportionment scheme under review in *United Jewish Organizations, supra,* allowed whites to control a substantial majority, although not 100%, of the Kings County legislative delegation. Thus the deliberate consideration of racial factors in drawing district lines in order to assure some minority group representation overall was found permissible even though the white majority thereby became a minority in some districts and suffered consistent defeats at the polls in those districts. The measure of the effect of an electoral scheme is not proportional representation but fair representation. *City of Richmond* v. *United States, supra,* 422 U.S. at 371; *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (D. D.C. 1972), aff'd, 410 U.S. 962 (1973).

The existence of racially disparate representation in a system for electing a given political body, however, when a less dilutive system is feasible, is at least one indication of the existence of constitutionally prohibited discrimination. "[N]othing is as emphatic as zero." *United States* v. *Hinds County School Board,* 417 F.2d 852, 858 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970). Where the vote is severely racially polarized, the at-large system functions as if blacks simply did not vote. In 1901,

the Bourbon and Populist factions of the Alabama Democratic Party agreed that it would be better if blacks were entirely removed from the political process so that it would not be necessary to compete, by corrupt or other means, for their vote (see page 69, *infra*). The at-large systems, as they function in Mobile today, disfranchise blacks from meaningful participation in local elections as effectively as the 1901 Alabama Constitution did in its time.

B. Other Evidence, Considered With the Showing of Actual Impact, Demonstrates Purposeful Discrimination

1. *The Relevant History of Racial Discrimination*

Historical background can be revealing evidence of "intent," particularly if it shows a series of official actions taken for invidious purposes. *Arlington Heights, supra,* 429 U.S. at 267. The history of official efforts in Alabama to exclude blacks from the political process strongly supports the inference that current adherence to the at-large plans by the City and the County of Mobile is racially motivated.[43]

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[43] Appellants in No. 78-357 contend (Br. 49-50) that the history of past racial discrimination has no significance in this case because the district court failed to make a specific finding concerning how "the existence of such discrimination 'precludes the effective participation' of blacks in the present electoral system." While this formulation of the significance of past official racial discrimination is to be found in *Zimmer* v. *McKeithen, supra,* 485 F.2d at 1305, and in this Court's analysis in *White* v. *Regester, supra,* of the circumstances of the Mexican-Americans in Bexar County, it is clear that this formulation does not represent the only consideration to be

The Reconstruction Act of March 2, 1867, ch. 153, Section 5, 14 Stat. 428, required, as a precondition to reentry into the Union, that Alabama call a constitutional convention and frame a constitution to extend the elective franchise to male citizens over 21 of whatever race or previous condition of servitude. Having done so, Alabama was readmitted to representation in Congress in 1868 on the "fundamental condition" that it would never amend its constitution so as to deprive of the franchise those permitted to vote under the 1867 state constitution, except on the basis of felony convictions or durational residency requirements. Act of June 25, 1868, ch. 70, 15 Stat. 73. Blacks were active in politics during the post-Reconstruction years, and Mobile was a center of black activism (see pages 8-9, *supra*). Extra-legal means, such as fraud and intimidation were used extensively, however, as whites mounted an effort to regain their former supremacy. M. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* 217-232 (1955)

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given a history of discrimination. In *White* v. *Regester, supra*, 412 U.S. at 766, this Court noted with approval the district court's reference "to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes." And in *Nevett* v. *Sides, supra*, the Fifth Circuit explained that its "*Zimmer* criteria go to the issue of intentional discrimination * * *." 571 F.2d at 222. As noted above (pages 32, 54-55), a history of official racial discrimination, particularly in matters affecting the franchise, is obviously indicative of intent in enacting or maintaining an electoral scheme that injures the interests of blacks.

("McMillan"); *United States* v. *State of Alabama*, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court).

In the 1890's, economic dissatisfaction led to the rise of the Populist wing of the Democratic Party, which began to challenge the hegemony of the Bourbon Democrats. The competition between these two factions made it essential that each manipulate the black vote which, often as not, went to the highest bidder. McMillan, *supra*, at 227. Thus sentiment arose for the disfranchisement of the blacks. W. Skaggs, *The Southern Oligarchy* 129 (1924); see also Bolden A. 45. On March 23, 1900, and July 10, 1902, the State Democratic Executive Committee passed resolutions barring blacks from participating in primary elections. Minutes of the Democratic Executive Committee, Vol. 2, at 52-54; Vol. 5 at 67. The white primary was to continue in Alabama until 1944, when it was held unconstitutional in *Smith* v. *Allwright*, 321 U.S. 649. Meanwhile, a constitutional convention was convened in 1901, the principal purpose and result of which was to devise stratagems that would disfranchise blacks without affecting whites—such devices as subjective "good character" and literacy requirements and a noncompulsory cumulative poll tax. *United States* v. *State of Alabama*, *supra*, 252 F. Supp. at 98-99.

The end of World War II and the demise of the white primary in 1944 brought a resurgence of black political activism in Alabama generally, and in Mobile in particular (Bolden A. 74-75). To thwart that

movement, the Alabama legislature passed the Boswell Amendment to Section 181 of the 1901 Constitution, substituting for the original literacy requirement a new qualification: that registrants be able to understand and interpret any provision of the United States Constitution presented to them. Not surprisingly, potential Negro registrants rarely "understood" or "interpreted" those provisions to the satisfaction of the registrars. Black Mobilians brought and won the suit in which the Boswell Amendment was struck down as unconstitutional on its face and as administered. *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three-judge court), aff'd per curiam, 336 U.S. 933 (1949).

Nonetheless, soon after this, in 1951, the legislature passed a similar amendment, replacing the inherently subjective "interpretation" test with the requirement that applicants be able to "read and write any article of the Constitution of the United States in the English language * * *." Alabama Constitution, Article 8, section 181, as amended by Act of December 19, 1951. Discriminatory administration of the new literacy requirement became the basis of a host of suits against individual county registrars under the 1957 and 1960 civil rights acts. See, *e.g.*, *State of Alabama* v. *United States*, 304 F.2d 583 (5th Cir.), aff'd, 371 U.S. 37 (1962). The test was ultimately suspended when, on August 7, 1965, the Attorney General designated Alabama as a state that maintained a "test or device" within the meaning of Section 4(c) of the Voting Rights Act of 1965. 30 Fed.

Reg. 9897. Finally, in a suit brought by the Attorney General under Section 10 of the Voting Rights Act of 1965, a three-judge court invalidated Alabama's long-standing cumulative poll tax. *United States* v. *State of Alabama*, *supra*, 252 F. Supp. at 104. Thus, every formal barrier to black participation in Alabama politics yielded only to federal legislation and federal court action.

There remained, however, the possibility of rendering the black vote impotent through discriminatory apportionment. In 1957, the Alabama legislature redefined the boundaries of the City of Tuskegee to exclude virtually all of its black residents from municipal elections. This Court struck down that action in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). That decision opened the decade in which this Court entered the "political thicket" to correct malapportionment even where race was not a factor. But in Alabama, race, as the district court found (Bolden J.S. App. 30b; Brown J.S. App. 35b-36b), never ceased being a factor in apportionment; for during the 1960's, the state was still battling to retain white supremacy at the polls.

In 1962, a three-judge court in Alabama held that the state's failure to reapportion since 1901, resulting in gross malapportionment of the state legislature, was justiciable, and this Court agreed. *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), aff'd *sub nom. Reynolds* v. *Sims*, *supra*. On remand, the district court considered a multimember district plan promulgated by a special session of the legislature.

Without finding fault with multimember districting as such, the district court noted that the House plan had aggregated counties in a manner that reflected a purpose to dilute the impact of the black vote. *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965). Drawing on the principles articulated both in *Gomillion*, *supra*, and in *Reynolds* v. *Sims*, *supra*, the court held that this gerrymander violated both the Fourteenth and Fifteenth Amendments. *Sims* v. *Baggett*, *supra*, 247 F. Supp. at 104-105. "The House plan adopted by the all-white Alabama Legislature was not conceived in a vacuum," the court wrote. "If this court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf." *Id.* at 109. The court adopted a different multimember district plan and awaited the legislature's reapportionment to be based on the 1970 decennial census.

The year 1971 came and went without a reapportionment. Meanwhile, blacks in Montgomery, Mobile, and Birmingham brought suit challenging the existence of multimember districts imposed upon their counties by the earlier plan. The ultimate disposition of the 1970-1971 reapportionment cases was a court-ordered plan that introduced an all single-member districting scheme for the 1974 legislative elections. *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972) (three-judge court), aff'd, 409 U.S. 942 (1972), and that resulted in the election, for the first time, of blacks as members of the Mobile House delegation.

Several features of these last stages of the *Reynolds* v. *Sims* reapportionment in Alabama are of particular significance for the instant case. For one thing, it was state failure to reapportion, rather than state adoption of a new apportionment scheme, that was attacked in the 1970 suit. For another, the challenge by blacks to multimember districting took place only a few years after the Voting Rights Act of 1965 and the poll tax decision of 1966 had removed the remaining overt barriers to black voting. The congeries of circumstances surrounding *Sims* v. *Amos*, *supra*, indicate that the Alabama State Legislature was content to sit on the 1965 plan, including its racially dilutive features, rather than surrender the one remaining barrier to an effective black vote: multimember districts.

The implications of *Sims* v. *Amos* for the present cases are clear. From the post-war period, when blacks began attempting to assert their political rights through legal challenges to specific voting restrictions, up to the early 1970's, the Alabama State Legislature maintained the at-large schemes of election for the Mobile City Commission and Mobile County Board of School Commissioners. In 1965, when a bill was passed to permit the City of Mobile to adopt a mayor-council government, it was impossible to include single-member districts precisely because that would have resulted in adequate representation for blacks. Indeed, the record reflects that this was the principal consideration with respect to all redistricting bills (see Statement, *supra*, page

25) and explains why court intervention was necessary with respect to the state legislative districts. After these suits were filed, a school board bill did pass, but after it was struck down on procedural grounds, no valid substitute was passed in its stead. And at the time of the *Bolden* trial, a single-member district bill was in limbo because of a veto exercised by a state senator under the prevailing courtesy rule (Statement, *supra*, page 23).

We submit that the totality of these historical facts, both remote and recent, gives rise to the inference that the at-large systems at issue here are being maintained with racially discriminatory purpose. That inference is bolstered by the unresponsiveness of both the city commissioners and the school commissioners (see part 2, *infra*), and has not been rebutted by a showing that the at-large schemes serve any other substantial nonracial governmental interest (discussed in part C, *infra*).

2. *The Unresponsiveness of the City Commission and the Board of School Commissioners to the Particularized Needs of Blacks*

Elected officials, although legally representing the entire electorate, naturally effectuate the will of those they believe to be their constituency, *i.e.*, the majority. Where those officials are elected by single-member district constituencies, ordinarily enough different interests are represented in the governing body as a whole that coalitions must form if any of those interests are to be met. This is not the case where all the members of a governing body are

elected by the same constituency, *i.e.*, an at-large majority. For that reason, among others, single-member districts are preferred in court-ordered reapportionments. See *Chapman* v. *Meier*, 420 U.S. 1 (1975).

The best indicators that the group submerged by an at-large scheme is identifiable by race are the actions of the body so elected. In *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 149, 155, this Court recognized that in Marion County, Indiana, there was no pattern of racial bloc voting and there were no neglected interests that could be identified as "particularized" to blacks. By contrast, in *White* v. *Regester*, *supra*, 412 U.S. at 766-767, 769, this Court noted that candidates elected from Dallas County had never exhibited "good faith concern for the political and other needs and aspirations of the Negro community," and that the Bexar County delegation was unresponsive to Mexican-American interests.

After *Brown* v. *Board of Education*, *supra*, the Alabama legislature overtly opposed the decision of this Court and set out to nullify it. Much of the saga of the state's "interposition" efforts is set forth in *United States* v. *State of Alabama*, *supra*, 252 F. Supp. at 102. The story is too complex to bear repetition here. Suffice it to say that since the early 1960's, the burden of "interposition" has fallen to local school boards, which could thwart the orders of the federal courts by persistent inaction or evasive action. This was manifestly the situation in the case of Mobile County, as exemplified by the protracted litigation in *Davis* v. *Board of School Commissioners*

of Mobile County, C.A. No. 3003-63-H (S.D. Ala.), outlined in the Statement, *supra*, pages 21-22.

Appellants in No. 78-357 contend (Br. 50-51) that the district court's finding (Brown J.S. App. 41b-42b) of current unresponsiveness in their case, based on the *Davis* litigation, is unsupported because the most recent *Davis* opinion cited was issued in 1970. This argument, however, ignores the fact that the Mobile County schools case are still under the original desegregation order, and that as recently as 1977 the school board has been found to have followed a policy of assigning white principals to predominantly white schools and black principals to predominantly black schools. See Order, Findings of Fact and Conclusions of Law of the District Court dated October 27, 1977, *Davis* v. *Board of School Commissioners of Mobile County*, *supra*. The present unresponsiveness of the school board to minority interests is further demonstrated by its refusal, under pain of contempt, to elect a non-voting chairman as ordered by the district court, and by its efforts to alter board procedures to minimize the influence of the two recently elected black board members. (See Statement, *supra*, page 30, note 30.)

Similarly, there is no indication that the City of Mobile took any step, from 1954 onwards, to disestablish the discrimination and segregation which had traditionally pervaded every phase of city life, except, perhaps, to unify its dual fire departments into a single, all-white force. As recently as 1975, when the *Bolden* case was tried, the city commissioners

demonstrated their marked insensitivity to black interests in their remarks concerning the "mock lynching," cross-burnings, and absence of blacks from the governing boards. (See Statement, *supra* pages 19-20.) The commissioners also expressed the view that there was no need to deal with racial discrimination at the city level because federal law already dealt with it."

The numerous federal court decrees governing various aspects of life in Mobile (*supra*, page 18) are a measure of the city government's abdication. That these decrees were necessary proves dramatically that "[v]oting is * * * a fundamental political right, because preservative of all rights" (*Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 370). Only a minority that is thoroughly disfranchised needs to depend so pervasively upon the judicial, as opposed to the political, process to acquire the basic human rights which those who are able to affect the political process enjoy as a matter of course. *Black Voters* v. *McDonough*, *supra*, 565 F.2d at 7.

" The evidence of the actual conduct in office of the city commissioners makes it clear that the solicitation of endorsements from the Non-Partisan Voters League (NPVL) by some white candidates has little real significance, and certainly does not, as appellants in No. 77-1844 suggest (Br. 9), mean that the NPVL "[can] not be ignored by candidates or by incumbents."

C. The Evidence of Invidious Discrimination is Not Outweighed by Substantial Nonracial Interests in Maintaining Either of the Challenged At-Large Systems

Strong evidence of discrimination on the basis of race can, as explained above (pages 59-61), be overcome by a showing that the at-large system in question serves some substantial governmental interest not itself rooted in racial discrimination. That racial animus did not motivate initial adoption of the systems is not an adequate showing and, in any event, initial racial purpose is not the type of purpose alleged or proved in these cases. To rebut evidence of racial purpose in the maintenance and use of the plan, evidence is needed that the plan is being used and maintained to serve substantial nonracial purposes. No such evidence appears in the records of these cases. The proffered reasons for maintaining the at-large systems either were contradicted by the defendants' own witnesses (or by conduct of defendants) or are necessarily infected with racial considerations, given the racial polarization in the City and the County of Mobile.

In *Bolden*, there was a conspicuous lack of testimony regarding the present usefulness of the commission form of municipal government, *e.g.*, that it is operating, in fact, more efficiently and with less corruption than mayor-council governments operate elsewhere in the state or the nation. Commissioner Mims, testifying for defendants, did state (Bolden A. 483-484) that he is a strong supporter of com-

mission government, and believes it to be the "most responsive form of government." Commissioner Greenough, also one of defendants' witnesses, said only that he thought the choice of the form of city government was "up to the people of the city to decide," and that he did not see anyone "beating down the walls" to change it (Bolden Tr. 1087). He also conceded he was unable to say whether a transition to a governing body elected from single-member districts would be an advantage or a disadvantage for the city (Bolden Tr. 1087-1088). Aside from these remarks, to the extent that there was testimony from either side's witnesses on the subject, it was to the effect that the "strong-mayor-council" system is preferable, and is the system currently in use in Montgomery and Birmingham (*e.g.*, Bolden A. 251-253, 258-260; Bolden Tr. 332-335, 1152-1154; Bolden Pltf. Ex. 98, at 70-72).[45] Very few large cities continue to use the commission system. Its adoption peaked in 1917. By 1968, the commission form was in effect in 190 cities, representing 6.4% of all cities with populations over 5,000. C. Adrian, *Governing Urban America* 205, 223 (4th ed. 1972). Among political scientists, the prevalent view is that the commission does not work very well because without a strong, unified executive, there is no one to formulate a uni-

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[45] State Senator Roberts, a witness for the *Bolden* plaintiffs, testified that although Birmingham's council members were elected at large (albeit with subdistrict residency requirements), the Mayor of Birmingham believed election from single-member districts to be preferable (Bolden A. 260-261).

fied program or a rational budget. Adrian, *supra*, at 210.

It may be that some features of commission government—for example the combination of legislative and executive functions in officials made answerable to the public through popular election—have substantial considerations in their favor. The *Bolden* defendants never, however, suggested to the district court any hybrid plan by which such features might be retained, together with some kind of council elected from single-member districts, that would alleviate the racial dilution problem.[46] Instead they have insisted on retaining a system in which the entire governing body is elected at large. Their defense of the commission form of government is thus, at bottom, a defense of at-large elections.[47] Their nonracial justification for maintaining their electoral scheme is, accordingly, similar to that of the appellants in No. 78-357.[48]

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[46] We discuss this question in detail in point IV (pages 96-98, *infra*).

[47] This is evident also in the arguments they make to this Court in No. 77-1844 (Br. 19, 32-34).

[48] In the *Brown* trial, Dr. Voyles (testifying as a defense witness) stated that single-member district systems have certain disadvantages that at-large systems do not share. He observed that single-member districts are susceptible to gerrymandering (Brown Tr. 1317) and that they must be redistricted every ten years to comply with "one person, one vote" requirements (*id.* at 1290). There is nothing in the record to suggest, however, that the retention of the at-large system for electing the Mobile County school commissioners was based upon these considerations, and appellants in No. 78-357 (Br. 67-69) do not appear to rely on them.

In both cases it was undisputed that the at-large systems had long histories, but as the court of appeals observed in *Bolden* (Bolden J.S. App. 10a), the fact that a plan has existed for a long time is not a justification for it in the face of evidence that it has come to have discriminatory effects and is being maintained in order to perpetuate those effects. In any event, in the case of the Mobile County Board of School Commissioners any inference to be drawn in its favor from continued adherence to the scheme is weakened by the fact that the state legislature has already seen fit to pass a bill providing for single-member district school board elections, and the school commissioners themselves have at least publicly favored such legislation.[49]

Appellants in both cases also cite the need to elect officials holding city-wide (or county-wide) views, rather than mere parochial interests (No. 77-1844 Br. 33; No. 78-357 Br. 67-69).[50] In an at-large system characterized by racially polarized voting, and a residentially segregated racial minority, however, the broad perspective is likely to be the perspective simply of the majority racial group. The ability to ignore "local" interests includes the ability to be unrespon-

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[49] As explained in the Statement (pages 22-25, *supra*), however, the legislature has not managed to pass a bill invulnerable to challenge on technical grounds.

[50] Of course, in the "strong-mayor-council" form of government prescribed by the district court's judgment in *Bolden*, the mayor, elected by all city voters, could be a strong voice for city-wide interests.

sive, with impunity, to the particularized interests of the minority racial group. In any event, it is not at all clear what logic demands that bodies such as city governments be less "parochial" in the interests they represent than the state legislative delegation from the same geographic area. State legislatures set the broad outlines of public policy within which local governments must operate. But a city government is responsible for every street, every hydrant, park and library—for all the policies which affect the minutiae of every-day life. A school board's actions affect every child every day.

Finally, appellants in both cases (No. 78-357 Br. 64-67; No. 77-1844 Br. 32) rely on the proposition, recognized by this Court in its reapportionment cases, that it is desirable for political subdivisions such as cities and counties to be given some leeway in devising municipal government forms suited to their particular local needs. This argument for allowing retention of an at-large electoral scheme is, of course, only as good as the arguments demonstrating that the scheme is in fact tailored to the particular needs of that locality. Where no such demonstration has been made, it amounts only to a claim that local custom or preference should be respected. As we have argued above (pages 48-50, *supra*), however, while this Court's precedents counsel consideration of the needs of local governments for flexibility in municipal arrangements, they do not suggest either that long-standing local preferences, without more, are enough to outweigh strong evidence that a given scheme is

being maintained to serve a discriminatory purpose or that such preferences justify invidious discrimination. See *Dusch* v. *Davis*, *supra*, 387 U.S. at 116-117. See also *Avery* v. *Midland County*, *supra*, 390 U.S. at 479.

In sum, the defendants in these cases came forward with no cognizable evidence of substantial non-racial reasons for maintaining the challenged at-large voting schemes and hence did not overcome plaintiffs' evidence showing purposeful discrimination under *White* v. *Regester*, *i.e.*, plaintiffs' showing that the schemes "are being used invidiously to cancel out or minimize the voting strength" (412 U.S. at 765) of the black residents of the City and County of Mobile.

III THE FIFTEENTH AMENDMENT AND SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 PROHIBIT THE USE OF AT-LARGE ELECTORAL SCHEMES THAT DENY OR ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE

The plaintiffs in these cases alleged violations of both the Fourteenth and Fifteenth Amendments, and of Section 2 of the Voting Rights Act of 1965. The court of appeals, in the companion case of *Nevett* v. *Sides*, 571 F.2d 209, 220-221 (5th Cir. 1978), held that the constitutional claims were indistinguishable, and therefore found violations of both provisions in these cases (Bolden J.S. App. 12a; Brown J.S. App. 2a). If this Court holds that the courts below properly found that the challenged electoral schemes represent purposeful discrimination violating the rights

of the plaintiff classes under the Equal Protection Clause of the Fourteenth Amendment, then affirmance of the judgments on the basis of the Fifteenth Amendment as well will logically follow.[51] For it is settled that deliberate official discrimination against blacks in their exercise of the franchise violates the Fifteenth Amendment (*United States* v. *Raines*, 362 U.S. 17, 25 (1960); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)); and there is nothing in this Court's decisions under that amendment that would distinguish purposeful discrimination in the operation or maintenance of a scheme from purposeful discrimination in its original design.[52]

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[51] The courts below made no separate determination of the claim under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (Bolden J.S. App. 4a-5a n.3; Brown J.S. App. 1a-2a). Since Section 2 represents Congress' rearticulation of the Fifteenth Amendment (see *Voting Rights: Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 208 (1965)), its prohibition is at least coextensive with that of the Fifteenth Amendment. We note that an amendment to that section in 1975 (Pub. L. No. 94-73, 89 Stat. 402), by reference to 42 U.S.C. 1973b(f)(2) (Pub. L. No. 94-73, 89 Stat. 401), brings members of language minority groups within the protection of Section 2.

The statutory bases for suits by the United States alleging unlawful racial vote dilution are normally laws enacted pursuant to Section 2 of the Fifteenth Amendment: 42 U.S.C. 1971 and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

[52] Nor is there any ground for arguing that apportionment or vote dilution cases are cognizable only under the Fourteenth Amendment. "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth, and Nineteenth

We submit, however, that the judgments in these cases also may properly be affirmed by this Court under the Fifteenth Amendment, without reaching the Equal Protection Clause claims, so long as the Court accepts the findings of the courts below that the electoral schemes here are official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strength. This construction of the Fifteenth Amendment, as we show below, accords with the congressional purpose in its adoption, represents a reasonable reading of its language, does not conflict with the holding of any case this Court has decided under the Fifteenth Amendment, and follows logically from the decision of this Court in *Terry* v. *Adams*, 345 U.S. 461 (1953). Moreover, affirmances rested solely on the Fifteenth Amendment in these cases would wholly avoid any possible difficulties of limiting the deci-

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Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963) (dictum). In *Allen* v. *State Board of Elections* (*Fairley* v. *Patterson*), 393 U.S. 544 (1969), concerning the coverage of Section 5 of the Voting Rights Act of 1965, this Court observed that "[t]he Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens" (*id.* at 556). In holding there that a change from district to at-large elections for county boards of supervisors was a change covered by Section 5 and therefore one requiring clearance, the Court explained that a change to at-large elections could nullify the ability of members of a racial minority "to elect the candidate of their choice just as would prohibiting some of them from voting," where they are "in the majority in one district, but in a decided minority in the county as a whole" (*id.* at 569).

sion, such as those noted by this Court in *Whitcomb* v. *Chavis*, 403 U.S. 124, 156 (1971).[53]

A. The Language and the Legislative Purpose of the Fifteenth Amendment Extend to Practices Such as the Vote Dilution Schemes at Issue Here

The framers of the Fifteenth Amendment envisioned its function as not only preventing the states from disfranchising blacks as a group, but also securing for blacks a role in the political process sufficient to protect them from deprivations of other basic rights. Slavery "will never die," said Senator Ross,

[53] The order of our analysis in this brief has followed this Court's usual practice, which had led annotators of the Constitution to observe that "challenges to alleged racial gerrymandering are to be litigated under the equal protection clause." The Constitution of the United States of America, Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong., 2d Sess. 1545 (1972 ed.). This Court's decisions in the area of race and voting have followed a winding path as interpretations of the Fourteenth and Fifteenth Amendments have, themselves, evolved. The earliest white primary cases were decided under the Fourteenth Amendment because there was some doubt whether participation in primaries was "voting" for Fifteenth Amendment purposes. See, *e.g.*, *Nixon* v. *Herndon*, 273 U.S. 536 (1927). On the other hand, *Gomillion* v. *Lightfoot*, *supra*, was predicated upon the Fifteenth Amendment in part because it had not yet been settled that debasement of the vote through apportionment or districting fell within the ambit of the Equal Protection Clause. In the era since *Reynolds* v. *Sims*, 377 U.S. 533 (1964), cases alleging racial vote dilution have generally been decided under the Fourteenth Amendment. Not the least of the reasons for this is the fact that the issue has arisen most often in the context of a general one person, one vote challenge to existing apportionment, as it did in *White* v. *Regester*, 412 U.S. 755 (1973).

"until the negro is placed in a position of political equality from which he can successfully bid defiance to all future machinations for his enslavement * * *." Without the right of suffrage "[he] is powerless to secure the redress of any grievance which society may put upon him." Cong. Globe, 40th Cong., 3d Sess. 983 (1869) (hereinafter "Globe"). See also Globe, *supra*, at 696 (Rep. McKee) ("You cannot in any manner so forcibly * * * secure to a man the protection of his rights and immunities in any other way in a free republic like this than by giving into his hands the ballot"); *id.* at 911-912 (Senator Willey), 990 (Senator Morton), and 1629 (Senator Stewart).

The language employed by Congress to implement this purpose clearly limits the amendment's reach to actions in which a governmental body is involved, because the amendment provides that the rights of citizens to vote "shall not be denied or abridged *by the United States or by any State* on account of race, color, or previous condition of servitude" (emphasis added). The amendment, by its terms, is also limited to denials or abridgments of the right to vote that citizens suffer because of their "race, color, or previous condition of servitude." The language does not, however, as appellants in No. 78-357 suggest (Br. 35-36 n.18), compel a reading that limits the reach of the amendment to actions taken for discriminatory reasons by government officials or bodies. If a state operates an electoral scheme that facilitates private action taken "on account of race,

color, or previous condition of servitude" and the result is elections in which blacks have no effective opportunities to elect candidates of their choice, then it can fairly be said that the voting rights of this excluded minority have been abridged by the state, and abridged on account of race. Cf. *Anderson* v. *Martin*, 375 U.S. 399, 403 (1964) ("'The crucial factor is the interplay of governmental and private action * * *,'" quoting *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958)). This is not to say, of course, that the Fifteenth Amendment, any more than the Fourteenth Amendment, guarantees any racial group the right to proportional representation. As we have argued in point I above (pages 42-46), however, there is a distinction between disproportionate representation of a racial group and denial of the opportunity for any meaningful representation at all.

Finally, unlike the broadly phrased Equal Protection Clause, the Fifteenth Amendment reads much like, and undoubtedly served as a model for, modern civil rights legislation prohibiting specific discrimination in specific areas. Phrases such as "because of race" or "on the ground of race" appearing in civil rights statutes have been held not to require a showing of specific racial impetus for measures that perpetuate or further the effects of discrimination, however or whenever that discrimination occurred. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights* ("*Arlington Heights II*") 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S.

1025 (1978). In both cases, the term "because of race" was interpreted in light of congressional objectives. Thus in *Griggs*, *supra*, 401 U.S. at 429-430, this Court said:

> The objective of Congress in the enactment of Title VII [of the 1964 Civil Rights Act] is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

See also *Arlington Heights II*, *supra*, 550 F.2d at 1290.

We suggest that a similar legislative intent is apparent in the formulation and passage of the Fifteenth Amendment, both originally and as rearticulated in Section 2 of the Voting Rights Act.[54]

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[54] We do not here suggest that the Court should hold that the standard under the Fifteenth Amendment is identical to the "effect" standard in *Griggs*, *supra*. As we argue below (pages 93-95), we believe that the present cases can be decided squarely under the doctrine of *Terry* v. *Adams*, *supra*, that a scheme is unconstitutional if it maximizes the effect of purposeful private racial animus.

B. This Court's Decisions Under the Fifteenth Amendment Are Consistent with Our Submission Here

Nearly all of this Court's cases decided under the Fifteenth Amendment have involved challenges to laws enacted or administered with a clear discriminatory intent. Official discriminatory purpose has therefore been "painfully apparent," as the court of appeals observed in *Nevett* v. *Sides*, *supra*, 571 F.2d at 220.[55] In none of this Court's cases in which claims based directly or indirectly on the Fifteenth Amendment were rejected can it be said that plaintiffs had placed before the Court the question whether state action, benign in itself, is rendered unconstitutional by its interaction with private discrimination to produce a discriminatory result. In both *United States* v. *Reese*, 92 U.S. 214 (1875), and *James* v. *Bowman*, 190 U.S. 127 (1903), the question was the power of Congress under Section 2 of the Fifteenth Amendment to impose criminal penalties on individuals for certain actions relating to the exercise by others of the franchise. In *Reese*, the Court found the statute in question beyond the power of Congress because it appeared to reach any "wrongful" interference "to prevent the exercise of the elective franchise without regard to * * *discrimination [on account of race, color, or previous condition of servitude]." 92 U.S. at 220. In *James*, the Court struck down a statute that imposed criminal penalties on private citizens without reference to any state action. The Court held that a "statute which purports to punish *purely* individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress." 190 U.S. at 139 (emphasis added).

[55] The laws and practices struck down under the Fifteenth Amendment present a striking array of stratagems to evade the mandate of that amendment. See, *e.g.*, *Guinn* v. *United States*, 238 U.S. 347 (1915) (grandfather clause); *Gomillion* v. *Lightfoot*, *supra* (racial gerrymander); *Alabama* v. *United States*, 371 U.S. 37, aff'g 304 F.2d 583 (5th Cir. 1962) (discriminatory application of voting tests).

In *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), this Court upheld a literacy test requirement neutral on its face and, for the purposes of the case before the Court, not shown to be discriminatorily applied. The Court proceeded on the assumption that "[l]iteracy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show" (*id.* at 51). It thus did not address the question, posed later, under the Voting Rights Act of 1965, in *Gaston County* v. *United States*, 395 U.S. 285 (1969), whether a literacy test may be imposed upon potential voters in a population in which the effects of inferior education received in segregated schools have produced a higher rate of illiteracy among blacks.

Finally, in *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), in which this Court rejected racial gerrymandering claims based on both the Fourteenth and Fifteenth Amendments, purpose was necessarily the central focus of the case, for as this Court later noted (*Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 156 n.34), the challenge there was to "a single-member

district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates in safe Negro districts." There was no showing that the allegedly discriminatory line drawing had deprived blacks of the opportunity for political representation.[86]

Not only does no decision of this Court foreclose the Fifteenth Amendment argument we are making here; at least two decisions of this Court support it.

In *Smith* v. *Allwright*, 321 U.S. 649 (1944), this Court considered state election laws that were racially neutral on their face, but that authorized primary elections—among them one conducted by the state's Democratic Party in which blacks were denied the right to vote—and then restricted candidacy in

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[86] Thus, the fact that this Court cited *Wright* in its opinions in *Washington* v. *Davis*, 426 U.S. 229, 240 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), does not compel the conclusion, suggested by appellants in No. 78-357 (Br. 33-34), that the intent requirement of the Equal Protection Clause, as defined in *Davis* and *Arlington Heights*, must be satisfied in every case arising under the Fifteenth Amendment. Nor does the Court's citation of *Gomillion* v. *Lightfoot*, *supra*, in *Arlington Heights* (429 U.S. at 266) compel such a conclusion. In *Gomillion* petitioners' claim rested solely on the discriminatory purpose of the state law redrawing the city limits of Tuskegee so as to exclude the bulk of the black population, for they did not contend that they would have been entitled to vote in Tuskegee elections had they been excluded from the city for proper reasons. Indeed, Mr. Justice Whittaker (364 U.S. at 349, concurring opinion) saw it as a case presenting the kind of racial discrimination prohibited by the Equal Protection Clause as interpreted by the Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

the general election to those who had won in the primaries. The Court concluded that the state election requirements could be treated as an endorsement, adoption, or enforcement of the political party's discrimination and that the element of state action was thereby supplied. It further observed that the right to vote "is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." *Id.* at 664. The parallel with these cases, is, of course, not complete, in light of the major role in the election process that state law gave to the Democratic Party. But the critical factors were the same: the state sanctioned a system that enhanced the opportunity for private discrimination to fence blacks out of the political process, and white voters made use of that system to achieve the forbidden end. The closed Democratic Party functioned as a formalized bloc vote in an at-large system, assuring that candidates need not be accountable, in any measure, to the black element of the electorate.

The parallel with *Terry* v. *Adams*, *supra*, is much closer. There, the state involvement in the challenged discrimination was marginal at best. A racially exclusive private political club in one county in Texas (the Jaybird Association) preselected candidates prior to the state-wide primary; whites then voted as a bloc and their candidate "invariably won in the Democratic July primary and the subsequent general elections for county-wide office." 345 U.S. at 483

(opinion of Clark, J.) As in Mobile, the racial bloc voting was less preclusive as to candidates running for district, rather than county-wide, office. *Id.* at 483 n.13. No new enactment of the state supplied the requisite state action or indicated discriminatory intent. Indeed, the Court found most troublesome the question of relief, since the state itself had done nothing to maximize the potential for racial bloc voting. Nonetheless, eight Justices found a Fifteenth Amendment violation. Mr. Justice Black, writing for himself and Justices Douglas and Burton, followed the reasoning of two decisions of the United States Court of Appeals for the Fourth Circuit,[57] which he described as holding "that no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." *Id.* at 466. To Mr. Justice Frankfurter, "[t]he vital requirement is State responsibility —that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." *Id.* at 473. Finally, Mr. Justice Clark, joined by the Chief Justice and Justices Reed and Jackson, reasoned that "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of pub-

[57] *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948), and *Baskin* v. *Brown*, 174 F.2d 391 (4th Cir. 1949).

lic officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." *Id.* at 484. In short, all these opinions rest ultimately on the opportunity created by the state election machinery for racial bloc voting to be effective in denying blacks meaningful participation in the election process—formally, in the Jaybird primary, and informally in the official primary and general election.

In Mobile, the bloc voting is not accomplished under the umbrella of political association, as in *Terry*, or a slating process, as in Dallas County, Texas, but, as in Bexar County, Texas, is a matter of "custom [or] usage" (cf. 42 U.S.C. 1971(a)) under which the white-backed candidate who qualifies for the run-off election becomes the candidate of the white community. The black third of the electorate may influence who qualifies for the run-off, but, as the district court noted, the lack of residency requirements, the majority vote requirements, and the "place" system ensure that they cannot influence the ultimate selection (Bolden J.S. App. 5b-11b, 21b-22b; Brown J.S. App. 9b-13b, 21b-22b). Indeed, the candidate who has qualified for the run-off by virtue of too-conspicuous black support has received a "kiss of death" (see page 17, *supra*). Here, as in *Anderson* v. *Martin*, *supra*, 375 U.S. at 404, a Fourteenth Amendment case, the statute "promotes the ultimate discrimination which is sufficient to make it invalid." [58]

[58] Because the present cases involve governmental action (the at-large electoral schemes) that facilitates, and indeed

IV THE DISTRICT COURT'S ORDERS GRANTING SINGLE-MEMBER DISTRICT RELIEF WERE WITHIN THE SCOPE OF ITS REMEDIAL DISCRETION IN THE CIRCUMSTANCES OF THESE CASES

Under the relevant precedents of this Court, having found at-large elections unconstitutionally dilutive in both cases below, the district court was required to adopt all single-member district plans unless it could "articulate a 'singular combination of unique factors' that [would justify] a different result." *Connor* v. *Finch*, 431 U.S. 407, 415 (1977). Neither the city commission nor the school board purports to have powers of self-apportionment, and no legislative action had been taken while the cases were pending—other than passage of the ill-fated 1975 school board bill, and introduction of the flawed 1976 school board bill, discussed in the Statement (*supra*, pages 23-24).

The commission system of city government in its original form requires at-large elections. Disestablishment of at-large elections, therefore, necessarily required the district court to adopt some other system in the *Bolden* case. The district court did not, however, find constitutional fault with the unique feature of commission government, *i.e.*, the assignment of administrative tasks to the individuals who corporately constitute the city's legislature. The

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magnifies, private discrimination, this Court need not decide whether the Fifteenth Amendment may in some circumstances also proscribe electoral schemes that have a disparate racial effect absent state or private discriminatory intent. Cf. *Griggs* v. *Duke Power Co.*, *supra*.

court asked the parties to propose alternative constitutional plans. The *Bolden* defendants might have proposed, for example, a cabinet form of government similar to that used by parliamentary nations whereby the legislature, elected from single-member districts, selects several of its members to hold executive positions. Another possibility might have been a mixed plan in which, *e.g.*, five or six members would be elected from single-member districts and two or three elected at-large, the at-large members to fill administrative posts. See *Beer* v. *United States*, *supra* (city council combining district and at-large representation); *Wise* v. *Lipscomb*, *supra* (same). Still another possibility might have been to offer a plan by which members of a city council, elected from single-member districts, would also run independently for executive positions.

Had the *Bolden* defendants proposed any such nondilutive mixed plan, the district court might well have adjudged that the city's long investment in the commission system constituted a "special circumstance" warranting adoption of such a plan (although we express no view here on the propriety of any particular hypothetical plan). The city defendants, however, submitted no such plan.[59] Required as it was to adopt some scheme, the district court

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[59] We are advised that they suggested only that the district court might monitor the commission for discrimination or that subdistrict residency requirements might be introduced, while retaining at-large elections.

did not abuse its discretion in choosing the "strong mayor-council" system for which many witnesses had expressed a preference.[60] As we have argued (*supra*, pages 59-61), although some leeway is to be given local governments in choosing the governmental form that best suits their local needs and preferences, a particular feature of a local system—such as at-large voting—is impermissible if it serves as an instrument for invidious discrimination.

As for the Mobile County Board of School Commissioners at issue in *Brown*, no special circumstances appear that arguably would have warranted deviation, if requested, from the normal rule that single-member districts should be used in court-ordered reapportionment plans.[61]

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[60] The court-ordered remedial plan, of course, is not permanent. The state legislature is the ultimate repository of power to prescribe or authorize any form of government for the City of Mobile that is not constitutionally prohibited and that meets the requirements of the Voting Rights Act.

[61] The trial court's remedial order in *Brown*—insofar as it establishes an interim six-member board, requires the selection of a temporary non-voting chairman, and postpones elections to fill three school-board seats until 1980 and 1982—may be unnecessary to remedy the constitutional violation and arguably interferes unduly with the internal operations of the school board. The appellants in No. 78-357 do not, however, challenge the district court's relief in their brief, and the appellees in that case have not cross-appealed to this Court from the court of appeals' judgment upholding that relief. Accordingly, only the single-member district feature of that remedy is before this Court.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
DENNIS J. DIMSEY
MIRIAM R. EISENSTEIN
Attorneys

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